

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM COURT OF APPEALS
Whitbeck, P.J., Owens and Schuette, J.J.

SHERRY COMBEN ANTRIM COUNTY
TREASURER,

Plaintiff-Appellee,

v

STATE OF MICHIGAN, JAY B. RISING, in
his capacity as STATE TREASURER OF
MICHIGAN, and THE MICHIGAN
DEPARTMENT OF TREASURY

Defendants-Appellants,

and

PURE RESOURCES, L.P., a Texas limited
partnership, DOMINION RESERVES, INC., a
Virginia Corporation, WOLVERINE GAS &
OIL COMPANY, INC., a Michigan
Corporation, WARD HEIRS BEING:
EUGENIE R. ANDERSON, STEPHEN
WARD DEVINE, ELIZABETH PALMER
DEVINE WISEMAN, MICHAEL EDMUND
DEVINE, SUZANNE LEE DEVINE,
WILLIAM W. DUNN, DAVID W. FAY,
EDWIN R. FAY, PETER W. FAY, ROBERT
A. FAY, ROSAMOND S. FISHER,
FREDERICK T. GOLDING, successor trustee
under the Virginia W. Golding Trust
Agreement dated August 30, 1989, NANCY
HAMILTON, LISA MARRIOTT JONES,
DAPHNE FAY LANDRY, GEORGE S.
LEISURE, JR., PETER R. LEISURE, FLORA
NINELLES, aka Flora Fay Ninelles,
MARJORIE S. RICHARDSON, JAMES W.
RILEY, JR., WILLIAM A. RILEY,
BARBARA F. ROSENBERG, ELIZABETH
R.P. SHAW, ANN WARD SPAETH,

Michigan Supreme Court No. 127212

Court of Appeals No. 248963

Antrim County Circuit Court No. 02-7860-PS

BRIEF ON APPEAL - APPELLANTS

ORAL ARGUMENT REQUESTED



TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES	iii
QUESTIONS PRESENTED FOR REVIEW	x
STATEMENT OF PROCEEDINGS AND FACTS	1
MICHIGAN’S TAX FORECLOSURE PROCESS	6
I. 1893-1976.....	6
II. <i>Dow v Michigan</i> and subsequent amendments to the GPTA.....	8
III. 1999 PA 123.....	10
SUMMARY OF ARGUMENT	12
ARGUMENT	13
I. State defendants have standing to prosecute this appeal.....	13
A. Standard of Review	13
B. Requirements for Standing.....	13
C. Analysis.....	15
II. Severed oil and gas rights are subject to foreclosure under the GPTA.....	20
A. Standard of Review	20
B. Private oil and gas rights are subject to taxation and foreclosure under the GPTA.	20
C. Severed interests in property, unless separately assessed or exempt from taxation, are subject to foreclosure along with the surface estate.	23
III. Private oil and gas rights are not exempt from taxation under the GPTA by virtue of the severance tax act.....	28
A. Standard of Review	28
B. The severance tax was enacted as a tax on oil and gas producers, not a tax on the owners of oil and gas rights.	28
C. The severance tax act does not exempt severed oil and gas rights from ad valorem real property taxes.	31

D. The Legislature expressly recognized over 60 years ago that oil and gas interests were subject to foreclosure for nonpayment of ad valorem real property taxes even after enactment of the severance tax act.	37
IV. The Court of Appeals misunderstood the statutory role of the dormant minerals act, which has no impact on the taxability of severed oil and gas rights.	40
A. Standard of Review	40
B. Analysis	40
V. The requirements of the GPTA as amended by Act 123 afford owners of severed mineral interests due process protection consistent with the State and Federal Constitutions.	43
A. Standard of Review	43
B. Analysis	43
VI. A lessee of oil and gas rights under a recorded lease from the surface/mineral owner is entitled to notice in the foreclosure proceeding.	48
A. Standard of Review	48
B. Analysis	48
RELIEF	50

INDEX OF AUTHORITIES

	<u>Page</u>
 <u>Cases</u>	
<i>AFSCME v Detroit</i> , 468 Mich 388; 662 NW2d 695 (2003)	20, 28, 40, 43
<i>Antrim County Treasurer v Dep't of Treasury</i> , 263 Mich App 474; 688 NW2d 840 (2004)passim	
<i>Baker v State Land Office Board</i> , 294 Mich 587; 293 NW 763 (1940).....	38
<i>Bauer v Dep't of Treasury</i> , 203 Mich App 97; 512 NW2d 42 (1993), <i>lv den</i> 447 Mich 979 (1994)	33, 34, 37
<i>Bingham Twp v RLTD R Co</i> , 463 Mich 634; 624 NW2d 725 (2001)	20, 28, 40, 43
<i>Black Stone Minerals Co, LP v State of Michigan</i> , joined cases, Decision and Order Granting In Part and Denying in Part Defendant's Second Motion for Partial Summary Disposition (Nov 1, 2005)	18
<i>CAF Investment v Saginaw Twp</i> , 410 Mich 428; 302 NW2d 164 (1981).....	36
<i>Cowen v Dep't of Treasury</i> , 204 Mich App 428, 433-434; 516 NW2d 511, <i>lv den</i> 447 Mich 980 (1994)	34
<i>Consumers Power Co v Dep't of Treasury</i> , 235 Mich App 380; 597 NW2d 274 (1998)	39
<i>Curry v Lake Superior Iron Co</i> , 190 Mich 445; 157 NW 19 (1916)	23, 24, 4`
<i>Detroit Building Authority v Michigan Financial Investments, LLC</i> , unpublished opinion per curiam of the Court of Appeals, decided 7/5/05 (No. 253479), 2005 Mich. App. LEXIS 1609.....	49
<i>Detroit v Detroit Commercial College</i> , 322 Mich 142; 33 NW2d 737 (1948).....	33, 37
<i>Devillers v Auto Club Ins Ass'n</i> , 473 Mich 562; 702 NW2d 539 (2005).....	48
<i>Dolese v Bellows-Claude Neon Co</i> , 261 Mich 57; 245 NW 569 (1932)	49
<i>Dominion Reserves, Inc</i> , 322 Mich 142; 33 NW2d 737 (1948).....	33, 37
<i>Dow v Michigan</i> , 396 Mich 192; 240 NW2d 450 (1976)	passim
<i>Fritts v Krugh</i> , 354 Mich 97; 92 NW2d 604 (1958)	40
<i>Golden v Auditor General</i> , 373 Mich 664; 131 NW2d 55 (1964)	8
<i>Grievance Administrator v Lopatin</i> , 462 Mich 235; 612 NW2d 120 (2000).....	18

<i>Hammond v Auditor General</i> , 70 Mich App 149; 245 NW2d 544 (1976)	25, 26
<i>Hansen v Hall</i> , 167 Mich 7; 132 NW 457 (1911).....	22, 23
<i>Hilt v Weber</i> , 252 Mich 198; 233 NW 159 (1930).....	23
<i>Hoste v Shanty Creek Mgmt, Inc</i> , 459 Mich 561; 592 NW2d 360 (1999)	46
<i>In re Petition of Auditor General</i> , 260 Mich 578; 245 NW 522 (1932)	24, 42
<i>In re Smith Estate</i> , 343 Mich 291; 72 NW2d 287 (1955)	33, 37
<i>Jackson County Treasurer v Christie (In re Foreclosure of Certain Parcels)</i> , unpublished opinion per curiam of the Court of Appeals, decided 5/11/ 04 (No. 246672), 2004 Mich App LEXIS 1174, lv den 472 Mich 903; 696 NW2d 49	49
<i>Jaenicke v Davidson</i> , 290 Mich 298; 287 NW 472 (1939).....	48
<i>Kellogg Co v Dep't of Treasury</i> , 204 Mich App 489; 516 NW2d 108 (1994).....	20, 28, 40, 43
<i>Krench v State</i> , 277 Mich 168; 269 NW 131 (1936)	22, 27, 35, 41
<i>Lawnichak v Dep't of Treasury</i> , 214 Mich App 618; 543 NW 359 (1995).....	31
<i>Le Boeuf v Papp</i> , 243 Mich 318; 220 NW 792 (1928)	23
<i>Lee v Macomb Co Bd of Comm'rs</i> , 464 Mich 726; 629 NW2d 900 (2001).....	12, 13, 14
<i>Longyear v Toolan</i> , 209 US 414; 28 S Ct 506; 52 L Ed 859 (1908)	8
<i>Lucas v Wayne County Election Comm'n</i> , 146 Mich App 742; 318 NW2d 806 (1985).....	40
<i>Mannausa v Mannausa</i> , 374 Mich 6; 130 NW2d 900 (1964)	23
<i>Mark v Bradford</i> , 315 Mich 50; 23 NW2d 201 (1946).....	48
<i>Melia v Employment Security Comm'n</i> , 346 Mich 544; 78 NW2d 273 (1956).....	39
<i>Metropolitan Council No 23 v Oakland Co Prosecutor</i> , 409 Mich 299; 294 NW2d 578 (1980).....	35
<i>Michigan Consolidated Gas Co v Austin Twp</i> , 373 Mich 123; 128 NW2d 491 (1964)	32
<i>National Wildlife Federation v Cleveland Cliffs Iron Company</i> , 471 Mich 608; 684 NW2d 800 (2004)	12, 13, 14, 19
<i>People v Gilliam</i> , 108 Mich App 695; 310 NW2d 843 (1981).....	40
<i>People v Neumeyer</i> , 405 Mich 341; 275 NW2d 230 (1979).....	40

<i>Pigorsh v Fahner</i> , 386 Mich 508; 194 NW2d 343 (1972).....	23
<i>Porter v Auditor General</i> , 255 Mich 526; 238 NW 185 (1931)	25
<i>Pure Resources, LP v Michigan</i> , Ct Claims no. 03-56-MZ	3, 16
<i>Pure Resources, LP v Michigan</i> , joined cases, Decision and Order, October 28, 2003	3, 17
<i>Rathbun v State</i> , 284 Mich 521; 280 NW 35 (1938).....	passim
<i>Sewell v Clean Cut Mgmt, Inc</i> , 463 Mich 569; 621 NW2d 222 (2001)	19
<i>Smith v Auditor General</i> , 138 Mich 582; 101 NW 807 (1904).....	25
<i>Smith v Cliffs on the Bay Condominium Ass'n</i> , 463 Mich 420; 617 NW2d 536 (2000), <i>cert den</i> 532 US 1020; 121 S Ct 1958; 149 L Ed 2d 754 (2001).....	9, 44, 45, 46
<i>Tilchin v Boucher</i> , 328 Mich 355; 43 NW2d 885 (1950)	49
<i>Van Slooten v Larsen</i> , 410 Mich 21; 299 NW2d 704 (1980).....	42, 43, 46

Statutes

1893 PA 206, §8	36
1893 PA 206, § 61	6
1893 PA 206, § 66	7
1893 PA 206, § 72	7
1893 PA 206, § 74	7
1893 PA 206, § 78	7
1893 PA 206, § 127	7
1893 PA 206, § 131	7
1897 PA 229	7
1899 PA 107	7
1909 PA 280	7, 8, 38
1909 PA 280, § 8	7
1911 PA 51	26, 27
1911 PA 51 § 1	26

1913 PA 333.....	7
1913 PA 333, § 12.....	7
1915 PA 119.....	26
1921 PA 17.....	8
1921 PA 17, § 2.....	8
1921 PA 85.....	36
1929 PA 48.....	1, 28, 30, 31
1929 PA 320.....	7
1937 PA 114.....	38
1937 PA 155.....	38
1937 PA 325.....	38
1939 PA 329.....	38, 40
1941 PA 363.....	38
1945 PA 159.....	26
1964 PA 125.....	8
1965 PA 299.....	30
1966 PA 288.....	27
1967 PA 196.....	39
1994 PA 451.....	8
1996 PA 476.....	9
1998 PA 117.....	8
1999 PA 123.....	passim
2003 PA 263.....	10
1915 CL 456.....	7
1929 CL 3389 <i>et seq.</i>	36

1929 CL 3396.....	36
1929 CL 3606.....	28
1929 CL 10136 <i>et seq</i>	36
1948 CL 205.301 (title).....	28, 31
1948 CL 205.301.....	32
1948 CL 205.311.....	32
1948 CL 211.351 <i>et seq</i>	38
1948 CL 211.356.....	38
1979 CL 322.212.....	8
MCL 16.352.....	8
MCL 205.301 <i>et seq</i>	passim
MCL 205.301.....	30
MCL 205.303.....	30
MCL 205.311(1).....	32
MCL 205.312(2).....	30
MCL 205.315.....	passim
MCL 208.31(4).....	34
MCL 211.1 <i>et seq</i>	passim
MCL 211.1.....	21
MCL 211.2.....	35
MCL 211.2(1).....	21
MCL 211.3.....	21
MCL 211.6a.....	26
MCL 211.6b.....	27
MCL 211.8.....	35

MCL 211.27	22
MCL 211.78-.78p.....	1
MCL 211.78(3).....	1
MCL 211.78(5)(b).....	6
MCL 211.78(5)(e)	6
MCL 211.78(6)(b).....	11
MCL 211.78a(2).....	10
MCL 211.78b	10
MCL 211.78c	10
MCL 211.78f(1)	10
MCL 211.78f(2)	10
MCL 211.78g(1).....	11
MCL 211.78h(1).....	11
MCL 211.78h(5).....	11
MCL 211.78i	11, 45, 46, 47
MCL 211.78i(1)	45
MCL 211.78i(2)	11, 45, 47
MCL 211.78i(6)	11
MCL 211.78i(7)	45
MCL 211.78k(2).....	11
MCL 211.78k(5).....	passim
MCL 211.78l.....	2
MCL 211.131	22
MCL 211.131c	9, 45
MCL 211.131e	9, 27, 45

MCL 211.140	9, 22
MCL 211.140-142	9
MCL 322.212	8, 39
MCL 324.101 <i>et seq</i>	49
MCL 324.503(3).....	8
MCL 554.291 <i>et seq</i>	1, 40, 41
MCL 565.29	42
MCL 565.101 <i>et seq</i>	42
MCL 565.101	42
MCL 565.101a	42
MCL 600.6452	18

Other Authorities

OAG 1963-64, No 4160, p 118 (June 17, 1963)	29
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Rules

MCR 2.116(C)(7)	17
MCR 2.116(C)(8)	3, 17
MCR 2.116(C)(10)	3, 17

Constitutional Provisions

Const 1963, art 4, § 1	13
Const 1963, art 5, § 1	13
Const 1963, art 6, § 1	14
Const 1963, art 9, § 3	4

QUESTIONS PRESENTED FOR REVIEW

- I. The State is the Foreclosing Governmental Unit under the General Property Tax Act in numerous counties around the State. The Antrim County Treasurer, as the Foreclosing Governmental Unit in Antrim County, brought an action seeking declaratory relief in the Circuit Court, naming the State, owners of severed oil and gas interests, and oil and gas lessees as defendants. Although nominally a defendant, the position of the State is in opposition to the positions of codefendants. On codefendants' motions for summary disposition the Trial Court held that severed oil and gas interests are exempt from foreclosure under the General Property Tax Act by virtue of the severance tax act, adopted in 1929. The Court of Appeals affirmed.**

The State claims title to several million acres of oil and gas rights by tax foreclosure since 1929, some portion of which were severed from the surface estate prior to the tax foreclosure. The Circuit Court, in two related class actions, wherein the owners of severed oil and gas interests are seeking damages and to quiet title to oil and gas interests claimed by the State through tax foreclosure, has held that its ruling in this action is binding on the parties in the class actions. Does the State have standing to appeal from the Court of Appeals decision?
- II. Under the General Property Tax Act (GPTA) all property, real and personal, is subject to taxation unless expressly exempt. All non-exempt severed fee interests in land are subject to foreclosure along with the surface estate. Are oil and gas rights, the fee ownership of which is severed from the fee ownership of the surface estate, subject to foreclosure under the GPTA for nonpayment of real property taxes on the surface estate?**
- III. Under the GPTA all property, real and personal, is subject to taxation. The severance tax act provides an exemption from certain taxes unless expressly exempt. Are oil and gas rights, the ownership of which is severed from the fee ownership of the surface estate, exempt by virtue of the severance tax act from foreclosure under the GPTA for nonpayment of real property taxes?**
- IV. The GPTA addresses assessment and collection of taxes on real property and foreclosure of liens on delinquent properties. Because severed oil and gas interests are not subject to abandonment at common law, the dormant minerals act addresses the problem of identifying the owners of severed oil and gas interests by requiring the owners to take certain steps to protect their ownership from abandonment. Does compliance with the dormant minerals act preclude foreclosure of severed oil and gas interests for nonpayment of taxes under the GPTA?**

V. In *Dow v Michigan* this Court held that due process requires a procedure providing for (i) ordinary mail notice before sale to the person to whom tax bills have been sent and to "occupant," and (ii) after sale to the state, formal notice to all owners of significant property interests of the constitutionally required opportunity for hearing and redemption. The GPTA, as amended by 1999 PA 123, requires notice by certified mail to the taxpayer of record before the forfeiture of delinquent taxes and again before the judicial foreclosure hearing, certified mail to the address of the property before the forfeiture of the property, and certified mail notice to all owners of a property interest in forfeited property before the judicial foreclosure hearing. Does the GPTA, as amended by 1999 PA 123, afford owners of severed oil and gas rights due process protection consistent with State and Federal Constitutions?

VI. Section 15 of the severance tax act exempts oil and gas leases from taxation. All interests in real property are subject to foreclosure for delinquent taxes unless exempt from taxation. Foreclosure of the surface estate for nonpayment of taxes extinguishes the surface owner's interest in the mineral estate. Termination of a lessor's interest in property terminates the leasehold interest. Holders of significant property interests in property subject to foreclosure are entitled to notice of the foreclosure proceedings. Is the lessee of an oil and gas interest leased from surface owner who also owns the mineral estate entitled to notice of the foreclosure proceeding?

STATEMENT OF PROCEEDINGS AND FACTS

This appeal involves the relationship between the provisions of the General Property Tax Act (GPTA)¹ and the severance tax act² as they apply to fee interests in oil and gas that are severed from the surface fee ownership³ before the property is foreclosed for nonpayment of ad valorem real property taxes. The State contends that severed interests, including severed oil and gas interests, are subject to foreclosure along with the surface estate. The Court of Appeals held that the severance tax is in lieu of ad valorem real property taxes on oil and gas not yet removed from the ground and that severed oil and gas interests are not subject to foreclosure.⁴ The Court of Appeals also held that foreclosure of severed oil and gas rights under the GPTA is inconsistent with and precluded by the dormant minerals act.⁵ Approximately 45,000 acres of the State's oil and gas holdings acquired by tax foreclosure were severed from the surface ownership prior to the tax foreclosure.

In 1999 PA 123 (Act 123) the Legislature enacted major revisions to the foreclosure process under the GPTA.⁶ Prior to the adoption of Act 123, foreclosure of delinquent ad valorem real property taxes under the GPTA was handled by the State Treasurer and, prior to 1963, by the Auditor General. GPTA § 78(3) [MCL 211.78(3)], added by Act 123, gave counties the option to do their own foreclosures or have the State act as the Foreclosing Governmental Unit ("FGU"). Antrim County opted to do its own foreclosures.

¹ 1893 PA 206, MCL 211.1 *et seq.*

² 1929 PA 48, MCL 205.301 *et seq.*

³ The single term "severed" is used for two distinct concepts. In a title sense, fee ownership of mineral interests and other interests in real property, e.g., timber rights, development rights, and flowage rights, can be "severed" from the ownership of the surface estate. In an unrelated concept, minerals can be "severed" from the soil, i.e., removed from the earth.

⁴ *Antrim County Treasurer v Dep't of Treasury*, 263 Mich App 474, 481-483; 688 NW2d 840 (2004), Appendix 44a.

⁵ 1963 PA 42, MCL 554.291 *et seq.*

⁶ Sections 78-78p, MCL 211.78-.78p, were added to the GPTA.

The Antrim County Treasurer filed an eight-count Complaint for Declaratory Judgment seeking declaratory rulings related to the new foreclosure process. Named defendants were the State of Michigan, the State Treasurer and the Department of Treasury (collectively, State Defendants or the State), Pure Resources, LP, Dominion Reserves, Inc, Wolverine Gas & Oil Co, Inc and the Ward Heirs. Defendants other than the State Defendants are all major owners or lessees of severed oil and gas rights in Antrim County and elsewhere. The gravamen of the Complaint was the Treasurer's concern about the County's liability under section 78I of the GPTA [MCL 211.78I] for failure to give notice to owners of severed oil and gas interests in light of the difficulty of performing adequate title work with respect to such interests. The Treasurer acquired a complete title search of a single lot subject to foreclosure, which included 400 entries, over 300 of which dealt with oil and gas interests, covering approximately 1345 pages.⁷

The Complaint sought declaratory rulings on nine issues; four are particularly relevant to this appeal:

- Does a foreclosure under Act 123 extinguish ownership interests of the State of Michigan (Count I)?
- Are severed oil and gas interests a "property interest" subject to forfeiture and foreclosure under Act 123 (Count II)?
- Are taxes paid under the severance tax act paid in lieu of ad valorem real property taxes on severed oil and gas interests (Count III)?
- Do the notice provisions of Act 123 violate the due process rights of owners of severed oil and gas rights (Count IV)?

Defendant Pure Resources filed a Cross Claim challenging the State's title to oil and gas rights acquired through foreclosure of delinquent tax liens under the foreclosure provisions of the GPTA as existed prior to the adoption of Act 123. The Cross Claim was subsequently severed from the original action as *Pure Resources, LP v State of Michigan*.⁸ Pure Resources filed a

⁷ Complaint, p 8, ¶ 55, Appendix 80a.

⁸ *Pure Resources, LP v State of Michigan*, Antrim County Circuit Court no. 03-7933-CZ.

separate action against the State in the Court of Claims seeking damages with respect to severed oil and gas rights acquired by the State through foreclosure of delinquent tax liens under former foreclosure provisions.⁹ The Court of Claims action was subsequently joined with Antrim County Circuit Court action. The Circuit Court has certified a plaintiff class in the joined actions consisting of "every person and entity that acquired a severed oil and gas interest that the State claims it subsequently acquired through foreclosure of delinquent tax liens under the provisions of the General Property Tax Act."¹⁰

Pure Resources moved for summary disposition pursuant to MCR 2.116(C)(8) and (10) in the instant action regarding several issues raised in the Complaint. Pure Resources sought a declaratory ruling that the GPTA, as amended by Act 123, violates the Due Process and Takings Clauses of the State and Federal Constitutions with respect to owners of severed oil and gas interests as enacted and violates the Due Process Clauses as applied to it by the Antrim County Treasurer. Pure Resources also sought a ruling that severed oil and gas rights are exempt from ad valorem real property taxes pursuant to § 15 of the severance tax act [MCL 205.315]

Defendants Dominion Reserves and Wolverine Gas & Oil Co also moved for summary disposition pursuant to MCR 2.116(C)(8) arguing that oil and gas rights are exempt from ad valorem real property taxes pursuant to § 15 of the severance tax act and that the GPTA, as amended by Act 123, violates the due process and equal protection rights of severed oil and gas owners.

State Defendants were the only parties arguing that oil and gas rights were subject to ad valorem real property taxes and subject to foreclosure. At oral argument the Antrim County

⁹ *Pure Resources, LP v Michigan*, Ct Claims no. 03-56-MZ.

¹⁰ *Pure Resources, LP v Michigan*, joined cases, Decision and Order, October 28, 2003; Appendix 60a-61a.

Circuit Court judge made clear his concern that a holding that severed oil and gas rights are subject to taxation and foreclosure would expose the Antrim County Treasurer to significant liability if the Treasurer did not give notice of the pending tax foreclosure to holders of severed mineral interests.¹¹

On April 10, 2003, the Trial Court issued its Decision holding, *inter alia*:¹²

- Foreclosure of delinquent taxes under the GPTA, as amended by Act 123, does not extinguish severed oil and gas rights.¹³
- The notice provisions of Act 123 violate the due process rights of owners of severed oil and gas rights.¹⁴
- Foreclosure of severed oil and gas rights under Act 123 constitutes an unconstitutional taking of property because there is no essential nexus between the legitimate State interest in redevelopment of the tax delinquent surface estate and extinguishing severed oil and gas rights.¹⁵
- Taxation of oil and gas rights under the severance tax act different from taxation of other real property interests under the GPTA, does not violate equal protection because it is an "alternative means of taxation of designated real and tangible personal property in lieu of general ad valorem taxation.' Const 1963, art 9 § 3."¹⁶

In concluding that foreclosure of delinquent taxes under the GPTA, as amended by Act 123, does not extinguish severed oil and gas rights, the court held:

- Severance taxes are in lieu of ad valorem real property taxes on oil and gas rights.¹⁷
- Oil and gas rights are not subject to taxation under the GPTA.¹⁸
- Interpreting Act 123 as extinguishing severed oil and gas rights would conflict with the common law regarding oil and gas rights and render nugatory

¹¹ TR, 12/16/02, pp 27-28.

¹² Decision and Order Regarding Defendant Pure Resources L.P.'s Amended Motion for Summary Disposition and Defendants Dominion Reserves, Inc and Wolverine Gas & Oil Company, Inc's Motion for Summary Disposition, Appendix 13a.

¹³ Trial Court Decision, Appendix 17a.

¹⁴ Trial Court Decision, Appendix 28a-31a.

¹⁵ Trial Court Decision, Appendix 33a-35a.

¹⁶ Trial Court Decision, Appendix 35a-37a.

¹⁷ Trial Court Decision, Appendix 19a-22a.

¹⁸ Trial Court Decision, Appendix 22a-23a.

provisions of the dormant minerals act, which provides specific steps by which owners of severed oil and gas rights can protect their interest.¹⁹

The trial court decision noted concern about the county treasurer's liability if the court should hold that severed oil and gas rights are subject to foreclosure under Act 123.²⁰ Following argument on a motion for entry of judgment, held May 12, 2003, an Order was entered granting judgment on the issues addressed in the Court's written Trial Court Decision.²¹ At the May 12, 2003, hearing, the parties stipulated on the record as to the disposition of the Counts of the Complaint not addressed by the Trial Court Decision, including entry of judgment in the State's favor on Count I (a foreclosure under Act 123 does not extinguish any State-owned interest).²² An Order of Dismissal based on the stipulation was entered on May 12, 2003.²³ The Order of Dismissal was a final order.

The Court of Appeals affirmed, holding²⁴:

- The severance tax is in lieu of ad valorem real property taxes on oil and gas not yet removed from the ground and severed oil and gas interests are not subject to foreclosure.
- Foreclosure of severed oil and gas rights for delinquent taxes is inconsistent with and precluded by the dormant minerals act.
- Because severed oil and gas rights are not subject to foreclosure under the GPTA, owners of such rights "require no notice of the foreclosure proceedings, and no constitutional issue arises."

The Court of Appeals holding conflicts with the language of the severance tax act and the State's foreclosure of severed oil and gas rights over the last 90 years. Since 1909 each State

¹⁹ Trial Court Decision, Appendix 26a-28a.

²⁰ Trial Court Decision, Appendix 31a-32a, 34a-35a.

²¹ Order Granting Amended Motion for Summary Disposition of Pure Resources L.P.'s and Motion for Summary Disposition of Dominion Reserves, Inc. and Wolverine Gas & Oil Company, Inc, Appendix 39a.

²² TR, 5/12/03, pp 5-8.

²³ Appendix 42a.

²⁴ *Antrim County Treasurer v Dep't of Treasury*, 263 Mich App 474; 688 NW2d 840 (2004), Appendix 44a, 52a-55a.

agency entrusted with the management or sale of tax-reverted lands has complied with certain legislative mandates and reserved coal, oil and gas, and minerals when selling tax-reverted lands. The State presently holds oil and gas rights in 5.9 million acres of land, the vast majority of which were obtained by tax foreclosure. The Court of Appeals holding that the severance tax is in lieu of ad valorem real property taxes potentially invalidates the State's acquisition and reservation of severed oil and gas rights since the 1932 foreclosure of delinquent 1929 taxes. The parties in the class actions have identified approximately 45,000 acres of contested oil and gas rights.

The State Defendants applied for and were granted leave to appeal by this Court in an October 27, 2005, order. The order directed the parties to include among the issues briefed: (1) whether State Defendants have standing to prosecute this appeal, and (2) whether a lessee of mineral rights who has leased the rights from the surface estate owner is (a) entitled to notice in foreclosure proceedings under the GPTA, MCL 211.78(5)(e) or (b) has a "severed" mineral interest that is unaffected by foreclosure proceedings involving the surface estate.

MICHIGAN'S TAX FORECLOSURE PROCESS

I. 1893-1976

For over a century delinquent ad valorem real property taxes in Michigan have been subject to foreclosure under the GPTA. Adopted during the depression of 1893, the Act has been amended numerous times since. Although often amended, the substance of the foreclosure process remained fairly constant until the enactment of Act 123 in 1999. The process included the filing of a circuit court petition in each county seeking foreclosure of delinquent taxes,²⁵

²⁵ 1893 PA 206, § 61.

with notice of a hearing on the Petition by publication in local newspapers.²⁶ Following a hearing and entry of judgment, tax liens were offered at sale followed by a one-year redemption period.²⁷ If not redeemed within the year following the sale, the lands would be deeded to the private purchaser,²⁸ or, if bid to the State, would be reoffered at the next annual tax sale.²⁹ Property bid to the State in three consecutive years was deeded to the State and became available for homesteading.³⁰ 1897 PA 229 added §§ 140-143 to the GPTA, requiring tax deed holders to give notice to former owners of tax-foreclosed property and allowing former owners a six-month period after notification in which to redeem the property from the foreclosure. In 1899 PA 107 the Legislature amended GPTA § 131 to authorize the outright sale of State-owned tax-reverted lands that had been available for homesteading at least three years and had not been sought for homesteading.

The Public Domain Commission was established by 1909 PA 280 to manage, control and dispose of State tax lands. It was authorized to reserve coal, oil and gas, and minerals when selling tax-reverted lands.³¹ 1913 PA 333 renumbered § 8 of the public domain commission act as § 12 and *mandated* the reservation of coal, oil and gas, and minerals when the Public Domain Commission sold tax-reverted lands.³² Reservation was again made discretionary by 1929 PA 320. Lands sold by the Public Domain Commission, including tax-reverted lands sold under § 131 of the GPTA, were subject to reservation of coal, oil and gas and minerals.³³

²⁶ 1893 PA 206, § 66.

²⁷ 1893 PA 206, § 74.

²⁸ 1893 PA 206, § 72.

²⁹ 1893 PA 206, § 78.

³⁰ 1893 PA 206, §§ 127, 131.

³¹ 1909 PA 280, § 8, attached as addendum.

³² 1913 PA 333, § 12; 1915 CL 456, attached as addendum.

³³ *Rathbun v State*, 284 Mich 521; 280 NW 35 (1938).

In 1921 PA 17, § 2 the Legislature transferred "the powers and duties now vested by law in the Public Domain Commission" to the Department of Conservation. The authority in the public domain commission act to reserve coal, oil and gas and minerals remained unchanged until the adoption of 1964 PA 125 which ended the reservation of sand, gravel, clay and other nonmetallic minerals.³⁴ In amending the language of § 12 of the public domain commission act in 1964, however, the Legislature again authorized the Department of Conservation to reserve oil and gas rights when it sold tax-reverted lands. The Department of Conservation was transferred to the Department of Natural Resources ("DNR") by a type I transfer in 1965. [MCL 16.352]

The public domain commission act was repealed by 1994 PA 451 and the language of MCL 322.212 authorizing the reservation of coal, oil, gas and minerals was recodified at MCL 324.503(3). 1998 PA 117 amended the statute to limit, somewhat, the reservation of coal, oil and gas, and minerals in the sale of tax-reverted lands. [MCL 324.503(3)]

Prior to 1976 the GPTA did not require any notice of the tax foreclosure to individual interestholders (other than the taxpayer of record) in addition to notice by publication, a process held constitutional by the United States Supreme Court in 1908³⁵ and by this Court in 1964.³⁶ Thus, until 1976, severed ownership did not trigger any special notice requirements because the only notice given to interestholders other than the taxpayer of record was by publication.

II. Dow v Michigan and subsequent amendments to the GPTA

In *Dow v Michigan*³⁷ this Court held that notice by publication alone was inadequate for due process purposes and defined the necessary due process protection:

³⁴ See, 1979 CL 322.212, attached as addendum.

³⁵ *Longyear v Toolan*, 209 US 414; 28 S Ct 506; 52 L Ed 859 (1908).

³⁶ *Golden v Auditor General*, 373 Mich 664; 131 NW2d 55 (1964).

³⁷ *Dow v Michigan*, 396 Mich 192, 212; 240 NW2d 450 (1976) (footnote omitted).

[I]t would satisfy constitutional requirements if the state were to adopt a procedure providing for (i) ordinary mail notice before sale to the person to whom tax bills have been sent and to "occupant," and (ii) after sale to the state, formal notice to all owners of significant property interests of the constitutionally required opportunity for hearing and redemption. The burden required by the Constitution is manageable.

The Legislature enacted various amendments to the GPTA to comply with *Dow*, including the addition of § 131e. [MCL 211.131e] Section 131e provides that a right of redemption continues until owners of record interests in foreclosed property have been notified of a hearing before the Department of Treasury. An owner of an interest in foreclosed property may show cause at the § 131e hearing why the tax sale and the deed to the State should be canceled. Section 131e also allows redemption as a matter of right up to 30 days following the hearing. Section 131e originally required notice be sent to "owners of a significant property interest" for those lands "which have a state equalized value of \$1,000 or more." Amended by 1996 PA 476, effective December 26, 1996, § 131e required notice to "the owners of a recorded property interest in the property" This Court upheld the constitutionality of the notice provisions of § 131e in *Smith v Cliffs on the Bay Condominium Ass'n*.³⁸

Under this process tax liens were offered at tax lien sales in May of the third year of delinquency followed by a one-year redemption period. If not redeemed within the one-year period, the property was deeded to the private lien purchaser for final foreclosure under §§ 140-142 [MCL 211.140-142], or, if no private purchaser, was deeded to the State for foreclosure under §§ 131c and 131e. [MCL 211.131c, .131e]

³⁸ *Smith v Cliffs on the Bay Condominium Ass'n*, 463 Mich 420; 617 NW2d 536 (2000), *cert den* 532 US 1020; 121 S Ct 1958; 149 L Ed 2d 754 (2001).

III. 1999 PA 123

Act 123 prescribed a new, streamlined process in which there is no sale of tax liens. Instead, delinquent tax liens are forfeited to the county treasurer in March of the second year of delinquency and the tax lien is foreclosed at a circuit court hearing the following February. Foreclosed properties may be redeemed until the March 31 following the foreclosure.³⁹ Act 123 provides for a new and detailed series of notices to be given to owners of interests in delinquent properties. On March 1 of each year, taxes levied in the immediately preceding year that remain unpaid are returned to the county treasurer as delinquent. [MCL 211.78a(2)]

County treasurers send notices by first-class mail not later than June 1 and September 1 following return of taxes as delinquent to the taxpayer of record or the owner. [MCL 211.78b, .78c] Before February 1 of the year following the return of delinquent taxes county treasurers must send a third notice ("the February 1 notice") by certified mail to the taxpayer of record and, if different, to the owner as shown on the current records of the county treasurer and to interestholders of record identified as shown on the records contained in the office of the local assessor, local treasurer, and county treasurer. [MCL 211.78f(1)] The February 1 notice must also be sent to the occupant of the property, by first class mail, if notice is not otherwise sent to the address of the property. [MCL 211.78f(2)] As a general rule the pre-forfeiture notices would not be sent to the owners of severed interests such as severed mineral rights, timber rights, or development rights, since these interests would not normally appear of record in the offices of the local assessor, local treasurer or county treasurer.

³⁹ As originally enacted, the final redemption period expired 21 days after entry of Judgment. The process was amended by 2003 PA 263, to make uniform the expiration date on March 31.

On March 1 of the year following delinquency, if the delinquent taxes remain unpaid, the property forfeits to the county treasurer. [MCL 211.78g(1)] Forfeiture allows the FGU to seek a judgment of foreclosure if property is not redeemed as provided under the Act. [MCL 211.78(6)(b)] Forfeiture does not give the county treasurer, or the State if the State is the FGU, any right, title or interest in the property. [MCL 211.78(6)(b)]

FGUs must file a circuit court petition listing all property forfeited and not redeemed, not later than June 15 following the forfeiture. The petition must seek a judgment in favor of the FGU vesting absolute title in the FGU without further rights of redemption. [MCL 211.78h(1)]

FGUs must obtain a title search to identify "the owners of a property interest in the property" entitled to notice of the administrative show cause hearing and of the judicial foreclosure hearing. [MCL 211.78i(1)] "The owner of a property interest is entitled to notice" under Act 123 if the owner's interest is of record in the records in the offices of the county register of deeds, the county treasurer, the local assessor, or the local treasurer. [MCL 211.78i(6)]

FGUs must send notice of the administrative show cause hearing and of the judicial foreclosure hearing by certified mail, return receipt requested, to "the owners of a property interest in the property" at "the address reasonably calculated to apprise those owners of a property interest" in tax-delinquent property, concerning the pendency of the administrative show cause hearing and the judicial foreclosure hearing. [MCL 211.78i(2)]

A circuit court hearing is held within 30 days prior to March 1 of the year following the forfeiture. [MCL 211.78h(5)] A person claiming an interest in forfeited property may appear at the judicial foreclosure hearing to contest the validity or correctness of the taxes, interest, penalties, and fees. [MCL 211.78k(2)] A Judgment of Foreclosure is entered following the

hearing. [MCL 211.78k(5)] Title to parcels not redeemed by March 31 vests in the FGU.
[MCL 211.78k(5)]

March 2002 saw the completion of the first foreclosure cycle under Act 123 with foreclosure of unpaid 1997 and/or 1999 taxes.

SUMMARY OF ARGUMENT

State Defendants have standing to prosecute this appeal because they meet the requirements for standing set forth in *National Wildlife Federation v Cleveland Cliffs Iron Company* (*NWF v CCI*) and *Lee v Macomb Co Bd of Comm'rs*.⁴⁰

The GPTA, beginning in 1893, provided that all real property interests were subject to taxation, unless specifically exempted. There is no exemption for oil and gas interests, severed or otherwise. In 1909 the Legislature authorized, and in 1913 mandated, the reservation of oil and gas when the State sells tax-reverted lands. The Legislature thus recognized that oil and gas interests were foreclosed under the GPTA. In 1929 the severance tax act was enacted. The severance tax was adopted as a tax on producers for the privilege of engaging in the business of severing oil and gas from the soil. It was not a tax on the owners of oil and gas interests or on oil and gas in the ground. In 1938 the Legislature mandated the reservation of oil and gas rights upon sale of lands that reverted after 1938. The Legislature understood that oil and gas rights were subject to taxation and foreclosure even after the 1929 enactment of the severance tax act. The Legislature's understanding is consistent with the language and intent of the severance tax act. That act, by its very language, exempts oil and gas leases and oil and gas that have been severed from the soil, from taxation. It does not exempt other oil and gas interests from taxation.

⁴⁰ *National Wildlife Federation v Cleveland Cliffs Iron Company*, 471 Mich 608; 684 NW2d 800 (2004) ("*NWF v CCI*"); *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001).

The Court of Appeals erred in holding that the severance tax is in lieu of property taxes on severed oil and gas interests. It further erred in holding that taxation of severed oil and gas interests is precluded by the dormant minerals act. The dormant minerals act, like recording statutes generally, and the marketable record title act in particular, addresses title concerns and cures problems with marketability of real property interests. None of these acts concern taxation and none exempt property from taxation.

Although the Court of Appeals did not address the constitutionality of Act 123, the record before this Court demonstrates that the Act and its notice provisions provided severed oil and gas interest owners with due process consistent with the State and Federal Constitutions.

ARGUMENT

I. State defendants have standing to prosecute this appeal.

A. Standard of Review

Whether a party has standing is a question of law that is reviewed de novo.⁴¹

B. Requirements for Standing

In its October 27, 2005, Order granting leave to appeal, the Court directed the parties to brief whether State Defendants have standing to prosecute this appeal. This issue had neither been raised nor addressed by either the parties or the courts below. The State was the only appellant in the Court of Appeals. This Court analyzed standing requirements at length in *NWF v CCI* and *Lee v Macomb Co Bd of Comm'rs*.

Under the Michigan Constitution the Legislature is to exercise the "legislative power" of the State,⁴² the Governor is to exercise the "executive power,"⁴³ and the judiciary is to exercise

⁴¹ *Lee v Macomb Co Bd of Comm'rs*, 464 Mich at 734.

⁴² Const 1963, art 4, § 1.

⁴³ Const 1963, art 5, § 1.

the "judicial power."⁴⁴ The judicial power has traditionally been defined by a combination of considerations: the existence of a real dispute, or case or controversy; the avoidance of deciding hypothetical questions; a plaintiff who has suffered real harm; the existence of genuinely adverse parties; the sufficient ripeness or maturity of a case; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional issues; and the emphasis upon proscriptive as opposed to prescriptive decision making.⁴⁵ The "most critical element" of the judicial power "has been its requirement of a genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute, and one in which the plaintiff has suffered a 'particularized' or personal injury," an injury distinct from that of the general public.⁴⁶ The requirement of standing limits the exercise of the judicial power to appropriate cases and avoids judicial interference with the authority of the other branches of government.

In *Lee*, the Court said the "irreducible constitutional minimum" of standing has three elements:⁴⁷

First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be "fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Under these standards the State has standing to prosecute this appeal.

⁴⁴ Const 1963, art 6, § 1.

⁴⁵ *NWF v CCI*, 471 Mich at 614-615.

⁴⁶ *NWF v CCI*, 471 Mich at 614 (citations omitted).

⁴⁷ *Lee v Macomb Co Bd of Comm'rs*, 464 Mich at 739 (quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992) (citations omitted)).

C. Analysis

The State has two distinct interests in this litigation. First, the State Treasurer was the FGU under Act 123 in 51 counties for forfeitures occurring in 2001-2004 and remains the FGU in 13 counties for forfeitures in 2005 and subsequent years. The Complaint described the three State Defendants by their roles in the tax foreclosure process under Act 123.⁴⁸ The State's interest as an FGU relates to the administration of Act 123 and whether foreclosure of delinquent ad valorem real property taxes under Act 123 affects title to severed oil and gas interests. Like the Antrim County Treasurer, the State continues to face this issue each year it forecloses delinquent properties.

Second, the State owns significant acreage of oil and gas interests in Antrim County. In Count I of the Complaint, the Antrim County Treasurer claimed authority to foreclose the State's oil and gas interests.⁴⁹ These interests are also the subject of the two joined class actions involving some of the same parties that are involved in this action. In these class actions the Court held that its decision in the action now before this Court is binding on the parties in the class actions. The following brief history of those actions plainly establishes that the State has suffered a particularized injury as a result of the Trial Court's ruling.

Defendant-Appellee Pure Resources owns significant severed oil and gas interests in Antrim and other Michigan Counties. On November 18, 2002, Pure Resources filed a Cross Claim against the State Defendants, with class allegations, to quiet title to oil and gas rights claimed by the State that had been severed from the surface ownership prior to the State's tax foreclosure.

⁴⁸ Complaint, ¶¶ 3-5, Appendix 76a.

⁴⁹ Complaint, ¶¶ 82-89, Appendix 77a.

After the Cross Claim was filed, Dominion Reserves and Wolverine Gas & Oil Co moved for summary disposition on the original Complaint arguing that § 15 of the severance tax act exempts oil and gas rights from ad valorem real property taxes and that Act 123 violates severed oil and gas owners' due process and equal protection rights. Pure Resources also moved for summary disposition arguing that § 15 of the severance tax act exempts severed oil and gas rights from ad valorem real property taxes.

Prior to the Trial Court's ruling on the motions for summary disposition, the Cross Claim was separated from the original action and assigned a different docket number.⁵⁰ Pure Resources then moved for certification of a class in the Circuit Court class action. Soon thereafter, Pure Resources filed in the Court of Claims, also with class allegations, seeking damages related to oil and gas rights claimed by the State that had been severed from the surface ownership prior to the State's tax foreclosure.⁵¹ The Court of Claims action was joined with the Antrim County Circuit Court action by Order dated May 13, 2003.

Meanwhile, on April 10, 2003, following the separation of the Cross Claim, the Trial Court issued its Decision holding that pursuant to § 15 of the severance tax act severed oil and gas rights are exempt from ad valorem real property taxes and exempt from foreclosure. Orders concerning the Counts of the Complaint addressed in the Trial Court Decision and dismissing the remaining counts were entered by the Court on May 12, 2003.⁵²

At a June 9, 2003, hearing in the class actions, the Court preliminarily approved the class certification. On August 11, 2003, the State filed its first Motion for Partial Summary

⁵⁰ *Pure Resources, LP v State of Michigan* (now *Black Stone Minerals Co, LP v State of Michigan*), Antrim Co CC no. 03-7933-CZ.

⁵¹ *Pure Resources, LP v State of Michigan* (now *Black Stone Minerals Co, LP v State of Michigan*), Ct of Claims no. 03-56-MZ.

⁵² Appendix 39a, 42a.

Disposition raising various defenses pursuant to MCR 2.116(C)(7), (8) and (10). On October 28, 2003, the Court ruled that its decision in this matter was binding on the parties in the class actions:⁵³

The Defendant's assertion that the severance tax act does not exempt unextracted oil and gas from ad valorem real property taxes is equally misleading. Admittedly, the state does not collect a severance tax on unextracted oil and gas. However, it does not necessarily follow therefrom that unextracted oil and gas are assessed for tax purposes and, regardless of whether oil and gas interests have been severed from the surface estate, they pass with the surface estate upon foreclosure.

In the related case of *Comben v The State of Michigan, et al*, File No. 02-7806-PS, this Court issued a written decision and order, dated April 10, 2003, holding that properly following the procedures outlined in the GPTA does not extinguish title to oil and gas interests where the surface and subsurface estates have been severed. This decision is the law of the case. The purpose of the law of the case doctrine is to "maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). This Court will not revisit its decision in the *Comben* case and, therefore, rejects this argument in the context of this motion.

The Court directed that "[t]he class of Plaintiffs should include every person and entity that acquired a severed oil and gas interest that the State claims it subsequently acquired title to through foreclosure of delinquent tax liens under the provisions of the General Property Tax Act"⁵⁴ The class has since been identified and consists of approximately 200 persons or entities claiming approximately 45,000 acres of oil and gas rights that the State claims to have acquired by tax foreclosure since 1929.

After class members were identified, the State renewed its motion for partial summary disposition based on statutes of limitations and laches. The Court held that no statute of

⁵³ *Pure Resources, LP v State of Michigan*, joined cases, Decision and Order Regarding Defendant's Motion for Partial Summary Disposition (Oct 28, 2003), Appendix 57a (emphasis added).

⁵⁴ *Pure Resources, LP v State of Michigan*, joined cases, Decision and Order (Oct 28, 2003), Appendix 60a-61a.

limitations applied to the quiet title actions and that laches was not a defense. It further held that while the three year statute of limitations was applicable to Court of Claims [MCL 600.6452] damage claims, it did not begin to run until the class members "discovered or should have discovered a cause of action."⁵⁵ The Court further held that the Court of Appeals decision now before this Court was binding on the parties:⁵⁶

This Court held, in *Comben*, that the State did not acquire any interest in previously severed oil and gas interests when it foreclosed on property for non-payment of taxes. Therefore, based on law of the case, title to the severed oil and gas interests remained in the Plaintiffs.

The State nonetheless entered into oil and gas leases with various production companies. A lease is a conveyance by the owner of an estate to another of a portion of his interest therein for a term less than his own for a valuable consideration, granting thereby to the lessee the possession, use and enjoyment of the portion conveyed during the period stipulated.

The oil and gas leases entered into by the State were void as a matter of law because the State had no interest in the oil and gas. It is as if the leases never existed. Therefore, production of oil and gas was a conversion and the measure of damages is the value of the property at the time of the conversion.

Although the Circuit Court cited the "law of the case doctrine" when twice holding that the parties in the class actions were bound by its earlier decision in this action, the more appropriate holding would arguably be res judicata. The law of the case doctrine applies in situations where an appellate court has ruled on an issue and remanded the matter to a lower court. On the remand and any appeal therefrom, the initial appellate decision is binding.⁵⁷ Res judicata on the other hand, "bars a subsequent action between the same parties when the evidence or essential facts are identical. A second action is barred when (1) the first action was

⁵⁵ *Black Stone Minerals Co, LP v State of Michigan*, joined cases, Decision and Order Granting In Part and Denying in Part Defendant's Second Motion for Partial Summary Disposition (Nov 1, 2005), Appendix 67a-68a.

⁵⁶ *Black Stone Minerals Co, LP v State of Michigan*, joined cases, Decision and Order, November 1, 2005, Appendix 64a (citations omitted).

⁵⁷ *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000).

decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies."⁵⁸ Since there has been no final appellate decision and remand in this case, law of the case doctrine does not apply. Res judicata may very well apply, however, in the related class actions.

The State and Pure Resources are both parties in this action. Although nominally codefendants, their respective interests and arguments clash, with Pure Resources agreeing with the position advanced by plaintiff County Treasurer. The Trial Court held that, in light of § 15 of the severance tax act, severed oil and gas interests are not subject to foreclosure under the GPTA. This holding was fundamental to the Court's declaratory ruling that the Antrim County Treasurer need not give notice of the pending foreclosure of the surface estate to severed oil and gas owners because their interests are not subject to foreclosure. At the time the Trial Court decided this issue, the State had a significant interest in the litigation, both as an FGU in 51 counties and as a party against whom the plaintiff was seeking a ruling that the county could foreclose on State-owned mineral rights.

Since § 15 of the severance tax act has not been amended since its 1929 adoption, the Court has effectively held the State could not acquire severed oil and gas rights by property tax foreclosure since 1929. Pure Resources and the State contested this issue at great length in this action and the Trial Court's decision is likely res judicata as to the same issue in the subsequent class actions.

Given the profound impact of the lower courts' rulings on the State as an FGU and as the owner of thousands of acres of tax-reverted, severed oil and gas interests, this is an appropriate case for the exercise of the judicial power under the guidelines set forth in *NWF v CCI*. There

⁵⁸ *Sewell v Clean Cut Mgmt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001) (citation omitted).

exists a real dispute over the interpretation of Act 123 and the severance tax act between FGU Antrim County Treasurer and FGU State Treasurer. There exists a real dispute over the impact of the severance tax act on the foreclosure of severed oil and gas interests under the GPTA between the State as the owner of thousands of acres of tax-foreclosed severed oil and gas interests and Pure Resources as the owner of several thousand acres of severed oil and gas rights in Antrim County. The questions are not hypothetical. The published Court of Appeals decision is binding on subsequent courts regarding the application of Act 123 by the State Treasurer in the 13 counties in which the State Treasurer remains the FGU. The Trial Court in the consolidated class actions has already held that the decision presently on appeal is binding on the parties in the class actions. The issues are ripe and not moot. The issues are questions of law as to which this Court can grant effective relief. The issues are not legislative or political questions but, rather, questions of statutory interpretation within the constitutionally designated realm of the courts. The State has standing to pursue this appeal.

II. Severed oil and gas rights are subject to foreclosure under the GPTA.

A. Standard of Review

Because this issue was decided below by summary disposition and because the issue involves statutory construction review is de novo.⁵⁹ Declaratory rulings are also reviewed de novo.⁶⁰

B. Private oil and gas rights are subject to taxation and foreclosure under the GPTA.

The Trial Court held that oil and gas rights are not subject to taxation under the GPTA and therefore not subject to foreclosure. Although the Court of Appeals did not directly address

⁵⁹ *Bingham Twp v RLTD R Co*, 463 Mich 634; 624 NW2d 725 (2001); *Kellogg Co v Dep't of Treasury*, 204 Mich App 489, 492; 516 NW2d 108 (1994).

⁶⁰ *AFSCME v Detroit*, 468 Mich 388, 398; 662 NW2d 695 (2003).

whether oil and gas rights are subject to taxation under the GPTA, it held that there is no exception in the language of MCL 211.78k(5)(e) that would except oil and gas rights from foreclosure.⁶¹

The GPTA provides for the assessment of rights and interests in property, the levy and collection of taxes, and the foreclosure, sale and conveyance of property delinquent for taxes. The amendments in Act 123 do not change the treatment of severed mineral rights or other severed interests in real property. The Trial Court erred in holding that oil and gas rights are not subject to taxation and foreclosure under the GPTA.

Section 1 of the GPTA, from its inception in 1893, has always provided:

That all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation. [MCL 211.1]

Section 2 of the GPTA, since its inception, has provided that all interests in real property not expressly exempt are subject to the taxes imposed:

For the purpose of taxation, real property shall include all lands within the state, and all buildings and fixtures thereon, and appurtenances thereto, except such as are expressly exempted by law [MCL 211.2(1)]

Section 3, since its inception, has further required real property be assessed to its owner:

Real property shall be assessed in the township or place where situated, to the owner if known, and also to the occupant, if any; if the owner be not known and there be an occupant, then to such occupant, and either or both shall be liable for the taxes on said property [MCL 211.3]

In assessing the property, its "true cash value" or "cash value" is to be used. This term, as defined by § 27 of the GPTA, has always expressly required inclusion or consideration of the value of mines, minerals or other valuable deposits:

"[C]ash value" means the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price which could

⁶¹ *Antrim County Treasurer v Dep't of Treasury*, 263 Mich App at 480-481, Appendix 50a-51a.

be obtained of the property at private sale, and not at auction sale . . . or at forced sale. . . . *In determining the value the assessor shall also consider the advantages and disadvantages of location; quality of soil; . . . and value of standing timber; water power and privileges; and mines, minerals, quarries, or other valuable deposits known to be available in the land and their value.* [MCL 211.27 (emphasis added)]

This Court has repeatedly held on that oil and gas rights are subject to foreclosure under the GPTA. *Krench v State* involved property sold by the State in 1911 under the provisions of the public domain commission act, reserving oil and gas rights to the State.⁶² In 1934 the State leased its oil and gas rights and oil and gas were successfully drilled. The surface owner brought suit on various constitutional and statutory grounds and sought damages for the oil and gas removed by the State's lessee. This Court held that upon completion of the tax foreclosure, the State held fee title to the property, including oil and gas rights, and could, "like any other owner in fee, deed with reservation of the oil, gas and minerals."⁶³

*Rathbun v State*⁶⁴ involved homestead lands sold by the State pursuant to § 131 of the GPTA. [MCL 211.131] This Court held that the public domain commission act requirement that oil and gas rights be reserved when tax-reverted lands were sold applied to homestead lands sold under the GPTA. Thus, in both *Krench* and *Rathbun* this Court upheld the State's title to its reserved oil and gas rights acquired through tax foreclosure but reserved when the State sold the land.

In *Hansen v Hall*⁶⁵ this Court held that a private tax lien buyer was required to give notice under § 140 of the GPTA [MCL 211.140] to a *severed* mineral interest holder in order to perfect his tax deed. There, the issue was whether the severed mineral interest holder who

⁶² *Krench v State*, 277 Mich 168; 269 NW 131 (1936).

⁶³ *Krench*, 277 Mich at 169.

⁶⁴ *Rathbun v State*, 284 Mich 521; 280 NW 35 (1938).

⁶⁵ *Hansen v Hall*, 167 Mich 7; 132 NW 457 (1911).

retained the mineral interest when selling the surface estate was a "grantee or grantees under the last recorded deed in the regular chain of title" under § 140. While *Hansen* did not address the question of whether the severed mineral interest was subject to foreclosure, this Court's holding that ownership of undiscovered minerals constitutes an estate in the land requiring notice implies that the ownership of undiscovered minerals is subject to foreclosure under the GPTA.⁶⁶

In holding that private severed oil and gas rights are not subject to taxation and foreclosure under the GPTA the Trial Court erred in ignoring these decisions to the contrary. Courts must avoid reinterpreting settled rules fixing status of property.⁶⁷

C. Severed interests in property, unless separately assessed or exempt from taxation, are subject to foreclosure along with the surface estate.

That severed interests in land are subject to foreclosure along with the surface estate is well-established in Michigan law. In *Curry v Lake Superior Iron Co*⁶⁸ this Court rejected a severed mineral owner's attempt to acquire the surface estate by purchasing the lien for unpaid taxes at the tax sale and perfecting title. The Court held both the surface and severed mineral owner were liable for the taxes and the one who paid the taxes could seek contribution from the other.⁶⁹

The understanding of the law and the practice of the taxing officers of the State is set forth in the edition of the general tax law compiled by the auditor general's office for the year 1907. The note at page 43 of the compilation is as follows:

In determining the true cash value of land, the value of standing timber should be included. *Fletcher v Township of*

⁶⁶ Cf, *Le Boeuf v Papp*, 243 Mich 318, 321; 220 NW 792 (1928) (A negative reciprocal easement "is a very different interest than ownership of the minerals in the ground (*Hansen v Hall*, 167 Mich 7), or the ownership of standing timber on the land (*Dunn v Papenfus*, 202 Mich. 131). The purpose of the notice is to give opportunity to redeem from the sale.)

⁶⁷ *Pigorsh v Fahner*, 386 Mich 508, 514; 194 NW2d 343 (1972); *Mannausa v Mannausa*, 374 Mich 6, 9; 130 NW2d 900 (1964); *Hilt v Weber*, 252 Mich 198; 233 NW 159 (1930).

⁶⁸ *Curry v Lake Superior Iron Co*, 190 Mich 445; 157 NW 19 (1916).

⁶⁹ *Curry*, 190 Mich at 448 (emphasis added).

Alcona, 72 Mich 18 [40 NW 36]. The rule should be applied universally. *If another than one holding the title to the land or possession thereof claims an interest in standing timber or other products or deposits on the land, the owner or person in possession must secure relief from the burden of taxation through mutual agreement between himself and the owner of such products or deposits; the assessor cannot consider such claims.*

The italicized text remains sound in all such instances where the statute makes no provision for separate assessments of separately owned estates in a parcel of land. All estates including mineral fee ownership, or ownership in fee of oil and gas, are subject to the taxes assessed and levied against the lands described on the tax roll.

As the *Curry* Court further concludes:⁷⁰

In this State, therefore, we have this situation: All of the estates in any particular description must be assessed together, and it is unimportant whether the assessment is made to all or to but one of several owning interests or estates therein.

. . . . The owner of neither estate could protect his own property [from tax sale] without paying an obligation properly chargeable against the owner of the other. This situation presents a theoretical difficulty, but in our opinion not a practical one. If the owners of the several estates in a particular description are unable to agree upon the proportionate share of the tax assessed that each should pay, either may pay the whole thereof and pursue the other for contribution. The right to secure contribution being assured, we are of opinion that agreement between the owners of the several estates will not be found to be difficult.

This Court has reaffirmed this principle, finding that flowage rights held by a party other than the fee owner should have been assessed as part of the land:⁷¹

It is the rule in this State that a parcel of real estate must be assessed as an entirety at cash value, including worth of standing timber, mineral rights, "water power and privileges," etc. This legislative policy is emphasized by the fact that the statute mentions only a single exception, *i.e.*, the interests of tenants in common, section [6, see MCL 211.6]. The policy was noted and the rule declared in *Fletcher v Alcona Twp*, 72 Mich 18, and *Curry v Lake Superior Iron Co*, 190

⁷⁰ 190 Mich at 448-489 (citations omitted).

⁷¹ *In re Petition of Auditor General*, 260 Mich 578, 581-582; 245 NW 522 (1932) (citations omitted).

Mich 445, in which it was held, respectively, that standing timber and mineral rights must be assessed as part of the real estate although separately owned. . . .

* * *

In 1911 the legislature departed from the established policy with respect to the assessment of mineral rights, but returned to it in 1915. *Curry v Lake Superior Iron Co*, *supra*. This return is significant of the legislative intention that one assessment cover the description.

The Court of Appeals correctly rejected appellees' argument that severed oil and gas interests are not subject to foreclosure simply because the oil and gas interests are not assessed by the local assessor.

Defendants-appellees protest that if § 78k(5)(e) of the GPTA is taken to extinguish severed interests in oil and gas, persons holding such interests stand to lose property of sometimes great value because of the failure of a third party to pay taxes for which that interest holder had no obligation. This issue concerned the trial court as well. However, the emphasis that the trial court and the parties afford to special statutory provisions governing how oil and gas are to be taxed seems to presume something that is not necessarily so: that one with a partial ownership interest in a parcel of land may never lose that interest if the parcel is tax foreclosed if that fractional interest itself carried no tax obligations. Such other interests, not among the exceptions in MCL 211.78k(5)(e), that might be at risk because of tax foreclosure, whose owners would have no direct tax obligations in the matter, include residential leaseholds, rights of reversion, expectancies under testamentary or trust instruments, or contracts for purchase.⁷²

But, if a severed property interest is *exempt* from taxation, a tax foreclosure does not affect title to the severed estate, since only the delinquent taxes and the estate upon which the taxes can be assessed are subject to foreclosure and sale.⁷³ *Hammond v Auditor General*⁷⁴ concerned a parcel of property the State acquired by tax reversion and later sold, reserving mineral rights. The property was subsequently offered at tax sale for delinquent taxes and a

⁷² *Antrim County Treasurer v Dep't of Treasury*, 263 Mich App at 483, Appendix 53a.

⁷³ *Cf.*, *Smith v Auditor General*, 138 Mich 582; 101 NW 807 (1904) (exempt railroad property crossing a larger parcel of tax delinquent property was not subject to foreclosure, even though the tax description and tax deed did not exclude the railroad property); *Porter v Auditor General*, 255 Mich 526; 238 NW 185 (1931) (public land was exempt from taxation and the foreclosure and tax deed was void as to the public land, but otherwise valid).

⁷⁴ *Hammond v Auditor General*, 70 Mich App 149; 245 NW2d 544 (1976).

private bidder purchased the tax lien and perfected his title, including giving notice to the State of Michigan as the holder of the severed mineral interest. In the subsequent quiet title action, the Court of Appeals held that the severed mineral interest was State-owned and therefore exempt from taxation and foreclosure.

The Trial Court cites *Hammond* for the proposition that severed minerals are exempt from foreclosure under the GPTA. But this is not the holding in *Hammond*. Rather, *Hammond* holds that *State-owned interests* are exempt from taxation.⁷⁵ And *Hammond* recognizes that the State originally acquired the oil and gas rights by foreclosure of delinquent taxes on the surface estate.⁷⁶

The Legislature briefly provided for separate assessment of severed mineral and oil and gas interests. 1911 PA 51⁷⁷ provided for the separate assessment of all severed "mineral, coal, gas, salt, gypsum, oil, mining or other rights in or to any lands within this State, or to the ores, oils, gravel, valuable deposits or minerals contained therein" ⁷⁸ Section 6 of 1911 PA 51 directed the assessor to deduct from the whole value of lands assessed under the GPTA, that value the assessor assigned to the severed interests. Section 2 of the act required separate foreclosure against the surface and severed estates. 1911 PA 51 was repealed by 1915 PA 119.

The Legislature again specifically provided for the separate assessment of severed *metallic* mineral resources of known mineral value, or developed, or in production, with the adoption of § 6a of the GPTA in 1945 PA 159. [MCL 211.6a] The provision for separate assessment of metallic minerals was extended to severed metallic minerals that are not explored,

⁷⁵ *Hammond*, 70 Mich App at 152.

⁷⁶ *Hammond*, 70 Mich App at 153.

⁷⁷ Attached as addendum.

⁷⁸ 1911 PA 51 § 1 (emphasis added).

developed, or in production with the adoption of § 6b of the GPTA in 1966 PA 288. [MCL 211.6b]

Other than the language of 1911 PA 51 authorizing the assessment of severed oil and gas rights against the owner of the severed interest for the brief period 1911-1915, there has been no language suggesting that minerals (including oil and gas rights) other than metallic minerals are not assessed along with the surface estate and subject to foreclosure. To the contrary, the repeal of 1911 PA 51 suggests that the severed interests must again be assessed with the surface estate.

In *Rathbun* and *Krench*, this Court held that oil and gas rights were subject to foreclosure under the GPTA and the State could reserve the rights to itself upon sale of the foreclosed property. The Court did not address whether ownership of the oil and gas rights was severed from the surface. This is because, even if severed, the rights were foreclosed along with the surface estate under the GPTA. Not until the 1976 decision in *Dow v Michigan*⁷⁹ and the subsequent adoption of §131e did severed ownership become an issue, and then, only because notice was required to be given to all owners of significant property interests subject to foreclosure.

Where real property is severed into different estates—unless separately assessed or exempt from taxation—the entire property is assessed and owners of all estates are liable for the taxes due, subject to a right of contribution from other estate holders. Failure to pay taxes or properly redeem from forfeiture results in the entire property being foreclosed upon and all prior estates being merged in the new owner. The Court of Appeals correctly rejected arguments to the contrary.

⁷⁹ *Dow v Michigan*, 396 Mich 192; 240 NW2d 450 (1976).

III. Private oil and gas rights are not exempt from taxation under the GPTA by virtue of the severance tax act.

A. Standard of Review

Because this issue was decided below on summary disposition and the issue involves statutory construction, review is de novo.⁸⁰ Declaratory rulings are also reviewed de novo.⁸¹

B. The severance tax was enacted as a tax on oil and gas producers, not a tax on the owners of oil and gas rights.

As enacted in 1929 the severance tax was a tax on oil and gas producers, not a tax on the owner of oil and gas rights. The severance tax act was originally entitled:⁸²

AN ACT levying a specific tax to be known as the severance tax upon all corporations, associations, or persons engaged in the business of severing oil and gas from the soil; and prescribing the method of collecting the license; requiring all those engaged in the severance of such products to make reports of their business; to provide penalties and to prescribe for the disposition of the funds so collected, and to exempt those paying such specific tax from certain other taxes.

Section 3 of the act provided that "the payment of said severance tax shall be required of the severor or producer actually engaged in the operation of severing the oil or gas."⁸³

In 1963 the Director of the Department of Conservation requested an Attorney General opinion on the responsibility for payment of severance taxes on the production of oil and gas from lands leased for oil and gas exploitation by the State to a private party. The Director asked whether the tax could be imposed upon the State's proportionate share of all oil and gas produced and sold and whether the cost of the tax could be withheld from the State's royalty. The Attorney

⁸⁰ *Bingham Twp v RLTD R Co*, 463 Mich 634; 624 NW2d 725 (2001); *Kellogg Co v Dep't of Treasury*, 204 Mich App 489, 492; 516 NW2d 108 (1994).

⁸¹ *AFSCME v Detroit*, 468 Mich 388, 398; 662 NW2d 695 (2003).

⁸² 1929 PA 48, 1948 CL 205.301 (title).

⁸³ 1929 CL 3606.

General held that the State's share of production was subject to tax, but the incidence of the tax fell on the producer, stating.⁸⁴

Act 48, PA 1929, Sec. 1, provides in part as follows:

"There is hereby levied upon each corporation, association, or person engaged in the business of severing from the soil oil or gas, a specific tax to be known as the severance tax. * * *

It would appear from the above quoted statute that the producer or the party engaged in withdrawing the oil and separating it from the ground is the party upon whom the severance tax is levied. In other words, this is a specific tax.

* * *

We will first consider the industry of withholding a severance tax of the gross cash market value of the product. Our research discloses that a number of oil and gas producing States have enacted statutes levying production, severing, occupation, privilege and distribution taxes on gross productions of oil and gas. Examination of the work entitled "Summers on Oil and Gas," Section 801, page 410 indicates that the practice varies as to who bears the tax and he says as follows:

"* * * In some states the burden of the tax is borne by the lessee and royalty owner proportionately, but in others it is borne by the lessee or producer alone. In some states such taxes are in lieu of property taxes, but in others they are additional taxes."

The Michigan acts levying the severance and privilege taxes have not been judicially construed.

Examination of the State of Michigan lease furnishes no indication that the taxes imposed by the above statute are to be borne by the State of Michigan.

* * *

No arrangement is made in any of the clauses contained in the lease for the shifting of the tax burden on the 1/8 royalty interest of the State.

* * *

Under the Michigan acts, the privilege tax is imposed upon the severor or producer. There is authority to the effect that by statute or by agreement the shifting of this tax can be made to the Lessor. However, that is not the situation here. The lease with the State of Michigan does not provide for the assumption of the tax burden by the State of Michigan and if it did, such a provision would be invalid in the absence of statutes permitting the same.

⁸⁴ OAG 1963-64, No 4160, p 118 (June 17, 1963).

Soon thereafter 1965 PA 299 was adopted. This act amended the title and five sections of the severance tax act. The title was amended to read:⁸⁵

AN ACT levying a specific tax to be known as the severance tax upon all producers engaged in the business of severing oil and gas from the soil; prescribing the method of collecting the tax; requiring all producers of such products or purchasers thereof to make reports; to provide penalties; to provide exemptions and refunds; to prescribe the dispositions of the funds so collected; and to exempt those paying such specific tax from certain other taxes.

Section 1 was also amended and now provides:

There is hereby levied upon each producer engaged in the business of severing from the soil, oil or gas, a specific tax to be known as the severance tax. [MCL 205.301]

Section 12 was amended to define for the first time "producer" as meaning:

a person who owns, or is entitled to delivery of a share in kind or a share of the monetary proceeds from the sale of, gas or oil as of the time of its production or severance. [MCL 205.312(2)]

With respect to the base upon which the tax was computed, § 3 was amended to exclude from the measure of the tax, production and proceeds attributable to the State, and the United States, or any of the political subdivisions thereof. [MCL 205.303] Section 3 was amended to state that "the payment of the severance tax shall be required of each producer." [MCL 205.303]

The amendment accomplished two significant changes. First, State lessees were freed of the burden of remitting a tax on the State's share of production from lands leased by the State for oil and gas exploitation. Second, the act shifted a pro rata share of the burden of the tax to the lessor, the Attorney General having advised, as quoted above "there is authority to the effect that by statute or by agreement, the shifting of this tax can be made to the lessor."

Prior to the 1965 amendment, the severance tax (called a "license" in the title of the 1929 enactment) was, as § 1 of the act stated, a "specific tax" that fell on each entity "engaged in the

⁸⁵ 1929 PA 48, as amended by 1965 PA 299, MCL 205.301 (title).

business of severing from the soil oil or gas." It was not a tax on the owner of the oil and gas interest and was not in lieu of any taxes for which the oil and gas owner may have been liable. Owners of oil and gas interests did not pay the one-time tax on oil and gas production, but were not exempted from the annual liability for property taxes. The 1965 amendments to the severance tax act did not change the nature of the tax from an excise tax to a property tax.⁸⁶ Thus, the Court of Appeals erred in holding that the severance tax was in lieu of property taxes on oil and gas remaining in the ground.

C. The severance tax act does not exempt severed oil and gas rights from ad valorem real property taxes.

The Court of Appeals held that severed oil and gas rights are not subject to foreclosure because they are exempt from taxation by virtue of the severance tax act. Its analysis, however, was inconsistent and does not support its conclusion. The Court states:⁸⁷

For these reasons, § 15's broad language describing the exclusive nature of the severance tax, as applied to "property rights . . . or the values created thereby," should be taken to restrict taxation of all interests in oil and gas to the severance tax, with no distinction between known and unknown, developed and undeveloped, reserves, or between divided and undivided estate interests.

* * *

We find the special treatment of oil and gas in MCL 205.315 lends some credence to the supposition that MCL 211.78k(5)(e) does not extinguish severed interests in oil and gas, but does not compel that conclusion.

The Court of Appeals also infers, incorrectly, that the GPTA and the severance tax act "have a common purpose."⁸⁸

The severance tax act was adopted, as set forth in its title:⁸⁹

- To levy "a specific tax to be known as the severance tax."
- To impose the tax "upon all corporations, associations or persons engaged in the business of severing oil and gas from the soil."

⁸⁶ *Lawnichak v Dep't of Treasury*, 214 Mich App 618, 623-624; 543 NW 359 (1995).

⁸⁷ *Antrim County Treasurer v Dep't of Treasury*, 263 Mich App at 482-483, Appendix 52a-53a.

⁸⁸ *Antrim County Treasurer v Dep't of Treasury*, 263 Mich App at 481, Appendix 51a.

⁸⁹ 1929 PA 48, 1948 CL 205.301 (title) (emphasis added).

- To exempt "those paying such specific tax from *certain* other taxes."

The act, in imposing the tax, originally provided:⁹⁰

There is hereby levied upon each corporation, association, or person engaged in the business of severing from the soil oil or gas, a specific tax to be known as the severance tax. Each corporation, association, or person owning, controlling, managing, operating or leasing, in this state, any oil well or gas well, or any such corporation, association or person who produces in any other manner, any oil or gas by taking it from the earth, in this state, shall make monthly, on the first day in each month of each year, a report to the Michigan state tax commission in the form and manner prescribed by such commission showing the total amount of oil or gas produced by such corporation, association or person from each well or otherwise, during the month preceding and the actual market value thereof at the time of production.

"Oil" as used in the act "means petroleum oil, mineral oil or other oil *taken from the earth*."⁹¹

The severance tax is imposed upon oil and gas severed, i.e., removed, from the soil. The repeated references in the act to "such oil and gas" are limited to oil and gas that has been severed from the soil. The severance tax act does not apply to mineral interests other than oil and gas, although ownership of such mineral interests (e.g., coal, ores, limestone, sand, etc) may be severed from the surface estate.

The severance tax act, as the title declares, exempted those paying the tax from *certain* other taxes. "The title specifically deals with the scope of the exemption to be granted in the body of the act and, consequently, the exemption would be so limited."⁹² The exemption was then fully described in § 15, which provides:⁹³

The severance tax herein provided for shall be in lieu of all other taxes, state or local, upon the oil or gas, the property rights attached thereto or inherent therein, or the values created thereby; upon all leases or the rights to develop and operate any lands of this state for oil or gas, the values created thereby and the property rights attached to or inherent therein: Provided, however, Nothing

⁹⁰ 1948 CL 205.301.

⁹¹ 1948 CL 205.311 (emphasis added).

⁹² *Michigan Consolidated Gas Co v Austin Twp*, 373 Mich 123, 144; 128 NW2d 491 (1964).

⁹³ MCL 205.315 (emphasis added).

herein contained shall in anywise exempt the machinery, appliances, pipelines, tanks and other equipment used in the development or operation of said leases, or used to transmit or transport the said oil or gas: And provided further, That nothing herein contained shall in anywise relieve any corporation or association from the payment of any franchise or privilege taxes required by the provisions of the state corporation laws.

Section 15 is a tax exemption provision and must be narrowly construed.⁹⁴

Whatever else § 15 may exempt from taxation, it does not exempt from taxation the right to capture unextracted oil and gas, as it does not apply to the ownership of such rights. The severance tax is a tax on producers, not owners (see Argument III.B). Because the tax was not paid by oil and gas owners there is no logical reason why the exemption should apply to their interests. The language of § 15 is logical and consistent when it is recognized that the tax was paid by producers whose interests—oil and gas removed from the ground, leases and rights to develop or operate—are exempt from taxation. But the exemption goes no further.

The impact of § 15 has been considered by the Court of Appeals in earlier cases. When litigating each of these cases the State emphasized that the cases involved only oil and gas that had been severed from the soil, and did not address the issue before the Court in this matter—the impact of the severance tax act on the right to capture unextracted oil and gas. This was done deliberately to avoid a court inadvertently invalidating the State's reserved oil and gas rights acquired by tax foreclosure.

In *Bauer v Dep't of Treasury*⁹⁵ the Court of Appeals rejected the Department's argument that § 15 did not exempt royalty interests from individual income taxes. However, in *Cowen v Dep't of Treasury* the majority of a different panel of the court rejected *Bauer's* simplistic

⁹⁴ *In re Smith Estate*, 343 Mich 291, 297; 72 NW2d 287 (1955); *Detroit v Detroit Commercial College*, 322 Mich 142; 33 NW2d 737 (1948).

⁹⁵ *Bauer v Dep't of Treasury*, 203 Mich App 97; 512 NW2d 42 (1993), *lv den* 447 Mich 979 (1994) (evenly divided court).

analysis of § 15, as it applied to exempting oil and gas income from the single business tax ("SBT"):⁹⁶

If it were not for the binding effect of *Bauer*, we would conclude that the statement "in lieu of all other taxes," is not clear and unambiguous because it is modified by the clauses that follow the statement. . . . The tax tribunal construed the statute and determined that the exemption applied only to ad valorem property taxes. In order to review the tax tribunal's decision, we must also construe § 15. However, construction of the statute would be improper in light of the precedent set by *Bauer*, which found the statute to be clear and unambiguous.

The application of the *Bauer* analysis to the Single Business Tax (SBT) in *Cowen* highlighted the weakness of the *Bauer* analysis. The instant matter, calling into question the impact of over 70 years of tax foreclosures, highlights the weaknesses even more. The SBT at issue in *Cowen* is a privilege tax on the privilege of doing business in Michigan. [MCL 208.31(4)] It is not a tax upon oil or gas, the property rights attached thereto or inherent therein, or the values created thereby. Neither is it a tax upon leases or the rights to develop and operate any lands of this State for oil or gas, the values created thereby or the property rights attached to or inherent therein. Thus, it is not a tax that is replaced by the payment of severance taxes. Yet the *Cowen* court was bound by *Bauer*. The *Cowen* court was correct in determining that proper analysis of this issue required more analysis than accorded the issue in *Bauer*. Such an analysis demonstrates that *Bauer* is wrongly decided.

The *Bauer* court emphasized that § 15 of the severance tax act says "[t]he severance tax herein provided for shall be in lieu of all other taxes, state or local" Section 15 did not, however, stop there. And this Court should not base its analysis on just that small portion of § 15 since the language of the entire section should be considered. The Legislature did not exempt those subject to the severance tax from all other taxes, state or local. The legislation, as the title

⁹⁶ *Cowen v Dep't of Treasury*, 204 Mich App 428, 433-434; 516 NW2d 511, *lv den* 447 Mich 980 (1994).

to its enacting clause so clearly proclaims, exempted those paying the tax "from certain other taxes," and those "certain other taxes" are set forth in § 15.

To ignore the additional exemption language of § 15 denies the Legislature its exclusive constitutional authority to classify those upon whom a tax or taxes shall be incident and those who may be exempted. Moreover, a statute, not just its sections or a clause taken therefrom, is to be considered as a whole. No words or phrases are to be ignored since the Legislature is not to be presumed to have wasted its words.⁹⁷ Consistent with these judicially developed standards, the exempting provisions of the act cannot be extended or by construction enlarged beyond an exemption from taxation of severed oil and gas and oil and gas leases.

Prior to the adoption of the act, oil and gas severed from the soil was subject to the tax upon personal property imposed upon the owners thereof, i.e., producers, under provisions of the GPTA, the interest in such oil and gas being included within the class of personal property defined by § 8 of the GPTA as "[a]ll other personal property not herein enumerated, and not especially exempted by law." [MCL 211.8] Similarly, prior to the adoption of the severance tax act, under § 2 of the GPTA [MCL 211.2], an ad valorem property tax would have been imposed upon the real property interest associated with holding a leasehold interest in oil and gas with the right to develop and produce associated therewith. Thus, the severance tax act only exempts oil and gas severed from the soil and oil and gas leases from real and personal property taxes otherwise imposable under §§ 2 and 8 of the GPTA.

The oil and gas, until severed, are owned by the owner of the fee title.⁹⁸ A lessee has the right to extract, but has no ownership of the oil and gas. While that leasehold interest is

⁹⁷ *Metropolitan Council No 23 v Oakland Co Prosecutor*, 409 Mich 299, 317-318; 294 NW2d 578 (1980).

⁹⁸ See, *Krench v State*, 277 Mich 168, and *Rathbun v State*, 284 Mich 521.

specifically exempted by the language of § 15, the underlying fee title is not exempt. For property tax assessment purposes, the fee owner is assessable for the oil and gas owned. While the lessee's rights, i.e., their value, may not be used in establishing "true cash" value of the parcel assessed, the sums the lessee is obligated to pay (bonus, rental, royalty) could be used to establish the "true cash value" of the oil and gas owned by the lessor-owner.⁹⁹ The lessee's interest escapes taxation by virtue of § 15.

In 1929 oil and gas producers were subject to ad valorem real property tax, ad valorem personal property tax, and if a corporation, the levy of corporate fees or taxes.¹⁰⁰ There was no contemporaneous indication, and there has been no subsequent legislative action, suggesting that any exemption was being offered from any tax other than those then in force. The act does not suggest that exemption is being offered from any form of taxation other than ad valorem property taxes on severed oil and gas.

The Legislature clearly addressed only (and all) of those taxes to which persons or corporations were subject to in 1929. It exempted persons and entities from personal and real property taxes imposed or imposable upon severed oil and gas or upon oil and gas leases by §§ 2 and 8 of the GPTA. The Legislature made it equally clear that it was not exempting tangible personal property used by persons or corporations engaged in severing oil and gas and that corporations would not escape taxes then being imposed under 1921 PA 85¹⁰¹ and under 1893 PA 206, §8.¹⁰² Thus, the Legislature addressed all of the taxes to which persons or corporation

⁹⁹ See *CAF Investment v Saginaw Twp*, 410 Mich 428, 470-472; 302 NW2d 164 (1981) (Justice Levin, concurring).

¹⁰⁰ See 1929 CL, Chapter 59 (General Property Tax Law), Chapter 60 (Specific Taxes) and Chapter 196 (Corporation Fees and Reports), in particular 1893 PA 206, 1929 CL 3389 *et seq*, and 1921 PA 85, 1929 CL 10136 *et seq*.

¹⁰¹ 1929 CL 10136 *et seq*.

¹⁰² 1929 CL 3396.

engaged in severing oil and gas would be subject, and specifically indicated those for which an exemption was granted. The language of § 15, viewed in its entirety, expressly provides that it exempted persons and parties from *certain* taxes and none other than those *certain* taxes. Extending the exemption in § 15 to subsequent taxes would be contrary to this Court's decisions.¹⁰³

Bauer and *Cowen* were erroneously decided by the Court of Appeals and those errors have been compounded in this case. *Bauer* and *Cowen* should be overruled and the Court of Appeals holding that the severance tax is in lieu of ad valorem real property taxes on the right to capture unextracted oil and gas should be overturned. Regardless of this Court's view of the *Bauer/Cowen* analysis, the Court of Appeals holding in this case should be overturned because the severance tax is not a tax on the right to capture unextracted oil and gas and is not in lieu of ad valorem real property taxes on that right.

D. The Legislature expressly recognized over 60 years ago that oil and gas interests were subject to foreclosure for nonpayment of ad valorem real property taxes even after enactment of the severance tax act.

Following the stock market crash of 1929 many people were unable to pay their real property taxes. For several years following 1932 there was a moratorium on delinquent tax foreclosures. Planning commissions appointed by the governor concluded that the various plans to remedy the situation had failed to stop the abandonment of tax-delinquent land. Legislative committees made exhaustive studies in an effort to devise means of overcoming the rapidly growing peril, which was assuming catastrophic proportions. The result was the enactment of

¹⁰³ *In re Smith Estate*, 343 Mich 291, 297; 72 NW2d 287 (1955); *Detroit v Detroit Commercial College*, 322 Mich 142; 33 NW2d 737 (1948).

1937 PA 155 creating the State Land Office Board,¹⁰⁴ and the amendment of the GPTA by 1937 PA 114 (providing for the cancellation of delinquent taxes and special assessments).¹⁰⁵

The State Land Office Board was created to manage tax-reverted lands in the southern Lower Peninsula. Tax-reverted lands in the northern Lower Peninsula and the Upper Peninsula remained under the jurisdiction of the Department of Conservation. Sales of tax-reverted lands by the Department of Conservation remained subject to the procedures of 1909 PA 280,¹⁰⁶ including reservation of oil and gas rights upon sale of State-owned tax-reverted lands.

1939 PA 329 amended § 6 of the state land office board act,¹⁰⁷ authorizing owners of tax-reverted lands to make application to the Department of Conservation to repurchase the tax-reverted lands within 30 days after title vests in the State. Following receipt of an application for repurchase the Department of Conservation was required to offer the land at public auction to the highest bidder. If the former owner was the highest bidder or matched the highest bid, the former owner was entitled to "a quitclaim deed conveying fee title without exceptions or reservations"¹⁰⁸ If the former owner was not the highest bidder and did not match the highest bid, the highest bidder was entitled to a deed "conveying fee title *but reserving, however, to the state the coal, oil, gas and other mineral interests* pursuant to the provisions of act number 280 of the public acts of 1909"¹⁰⁹ Because sale had to be requested within 30 days after title vested in the State¹¹⁰ this language could only apply to lands foreclosed by the State after 1938. Thus, even for lands acquired by tax reversion under the GPTA after 1938, nine years

¹⁰⁴ 1948 CL 211.351 *et seq.*

¹⁰⁵ *See, generally, Baker v State Land Office Board*, 294 Mich 587; 293 NW 763 (1940).

¹⁰⁶ *See* 1937 PA 155, § 6.

¹⁰⁷ 1948 CL 211.356, attached as addendum.

¹⁰⁸ 1948 CL 211.356.

¹⁰⁹ 1948 CL 211.356.

¹¹⁰ Subsequently changed to 90 days by 1941 PA 363.

after the enactment of the severance tax act, the Legislature expressly mandated the reservation of oil and gas interests when the property was sold. The Legislature understood that the severance tax act did not exempt oil and gas rights from foreclosure under the GPTA. The Court of Appeals, however, ignored this clear legislative directive.

The DNR and its predecessors have consistently reserved oil and gas rights when selling tax-reverted lands since 1909. The 1929 enactment of the severance tax act did not change this practice. In 1964 the Legislature amended § 12 of the public domain commission act¹¹¹ to indicate that rights to sand, gravel, clay or other nonmetallic minerals would not be reserved upon the sale of tax-reverted lands under that act. The Legislature, however, re-enacted language stating that deeds conveying tax-reverted lands "may reserve all mineral, coal, oil and gas rights to the state" In re-enacting this language the Legislature is presumed to have been aware of the interpretation given this language by the officials charged with its administration and the re-enactment of the same language is legislative sanctioning of the interpretation.¹¹² The language adopted in 1939 PA 329 remained in place until repealed by 1967 PA 196.

This is not just a situation where the Legislature has acquiesced to the agency's longstanding interpretation of the statute. Rather, this is a situation where the Legislature expressly and repeatedly mandated that agencies take an action that, if the lower courts are correct, resulted in a taking of property from owners whose property was foreclosed after 1938 and sold pursuant to § 6 of the state land office board act.

¹¹¹ Then codified at MCL 322.212.

¹¹² *Melia v Employment Security Comm'n*, 346 Mich 544; 78 NW2d 273 (1956); *Consumers Power Co v Dep't of Treasury*, 235 Mich App 380, 388; 597 NW2d 274 (1999).

The GPTA and the state land office board act relate to the same subject matter and should be construed *in pari materia*.¹¹³ Where a statute can be construed as consistent or inconsistent with other statutory provisions, the courts should construe the provisions as being consistent with one another.¹¹⁴ Whenever possible, the courts must save legislation from unconstitutionality by reasonable and permissible interpretation.¹¹⁵ Courts are duty bound to construe statutes so as to be constitutional.¹¹⁶ The only interpretation of the severance tax act that is constitutional in light of 1939 PA 329 is that the severance tax act does not exempt unextracted oil and gas for ad valorem real property taxes.

IV. The Court of Appeals misunderstood the statutory role of the dormant minerals act, which has no impact on the taxability of severed oil and gas rights.

A. Standard of Review

Since this issue was decided below on summary disposition and because the issue presented involves statutory construction, review is de novo.¹¹⁷ Declaratory rulings are also subject to de novo review.¹¹⁸

B. Analysis

The Trial Court concluded that foreclosure of severed oil and gas rights for delinquent taxes was inconsistent with the dormant minerals act¹¹⁹ "because the owner of the severed oil and gas interest, who fully complied with the requirements of the dormant minerals act, could

¹¹³ Cf., *Rathbun v State*, 284 Mich 521; 280 NW 35 (1938) (GPTA and public domain commission act are *in pari materia*).

¹¹⁴ *Lucas v Wayne County Election Comm'n*, 146 Mich App 742, 751; 318 NW2d 806 (1985); *lv den* 424 Mich 903 (1986).

¹¹⁵ *Fritts v Krugh*, 354 Mich 97, 114; 92 NW2d 604 (1958); *People v Gilliam*, 108 Mich App 695; 310 NW2d 843 (1981).

¹¹⁶ *People v Neumeyer*, 405 Mich 341, 362; 275 NW2d 230 (1979).

¹¹⁷ *Bingham Twp v RLTD R Co*, 463 Mich 634; 624 NW2d 725 (2001); *Kellogg Co v Dep't of Treasury*, 204 Mich App 489, 492; 516 NW2d 108 (1994).

¹¹⁸ *AFSCME v Detroit*, 468 Mich 388, 398; 662 NW2d 695 (2003).

¹¹⁹ 1963 PA 42, MCL 554.291 *et seq*.

nonetheless lose his interest if the surface owner failed to pay taxes."¹²⁰ The Court of Appeals concluded "[t]he [trial] court's reasoning is sound."¹²¹ Both courts, however, misunderstand the role of the dormant minerals act.

The GPTA and the dormant minerals act address two very different subjects, while sharing the common goal of aiding development of abandoned property. Compliance with one act, however, does not negate the requirement to comply with the other. The GPTA addresses assessment and collection of taxes on real and personal property and foreclosure of liens on delinquent properties. On the other hand, as the Court of Appeals noted, "[t]he primary purpose of [the dormant minerals act] is . . . 'to facilitate development of those subsurface properties by reducing the problems presented by fragmented and unknown ownership.'"¹²²

The dormant minerals act addresses the problem of identifying owners of severed oil and gas interests when such interests are not subject to abandonment at common law. Because these interests could not be abandoned at common law, they could languish for decades until ownership became almost impossible to determine. The dormant minerals act addresses the problem of unknown ownership by requiring owners of severed interests to take affirmative action at least every 20 years to avoid abandonment of the severed interest. That an owner of a severed oil and gas interest complies with the dormant minerals act and records timely notice of the owner's interest does nothing to ensure collection of taxes. It merely identifies the owner and thereby aids development. Nothing in the language of the dormant minerals act indicates it was intended to alter the concept, set forth in *Rathbun* and *Krench* that oil and gas interests are subject to foreclosure under the GPTA or the concept, set forth in *Curry* and *In re Petition of*

¹²⁰ Trial Court Decision, Appendix 27a-28a.

¹²¹ *Antrim County Treasurer v Dep't of Treasury*, 263 Mich App at 484, Appendix 54a.

¹²² *Antrim County Treasurer v Dep't of Treasury*, 263 Mich App at 484, Appendix 54a, quoting *Van Slooten v Larsen*, 410 Mich 21, 44; 299 NW2d 704 (1980).

Auditor General that all estates, including severed estates, are subject to the taxes assessed and levied against the lands described on the tax roll.

In analyzing the recording requirements of the dormant minerals act in *Van Slooten v Larsen* this Court analogized to recording statutes generally, and the marketable record title act, in particular.¹²³ Such an analysis is equally applicable to this case and leads to the conclusion that compliance with the dormant minerals act does not exempt property from taxation any more than compliance with recording statutes.

Recording statutes render a prior deed void against a subsequent purchaser who records first, thus assuring a reliable means of protecting a grantee's interest by timely recording and thereby facilitating ownership and transfer of property. And the marketable record title act cures problems caused by conflicting chains of title by extinguishing interests arising prior to an unbroken record chain of title existing over a period of at least 40 years.¹²⁴ The dormant minerals act requires recording or certain other acts at least every 20 years to avoid statutory abandonment of the severed mineral interest. The similarity between the marketable record title act and the dormant minerals act was described by this Court in *Van Slooten*, as follows:¹²⁵

Although the dormant mineral act does not attempt to cure problems caused by conflicting claims in the same chain of title, its purpose is similar to the purpose of the marketable title acts in that it is designed to remove impediments to a severed mineral interest title's marketability caused primarily by the presence of unknown or unlocatable owners of undeveloped interests. Although the sources of the claims affected by the acts are different, *the two acts have similar objectives and requirements and both lead to substantially the same result.*

Neither the recording of a deed or other instrument, nor an unbroken 40-year chain of record title exempts property from taxation. This is because neither recording acts, in general,

¹²³ *Van Slooten v Larsen*, 410 Mich 21, 44, 47-48, 51 n 24; 299 NW2d 704 (1980). See also MCL 565.29; 565.101 *et seq.*

¹²⁴ At least 20 years for certain mineral interests, not including oil and gas. MCL 565.101, .101a.

¹²⁵ *Van Slooten v Larsen*, 410 Mich at 51, n 24 (emphasis added).

nor the marketable record title act, in particular, have any impact on taxation. Both are designed to remove impediments to acquiring and holding good title. Neither are designed nor intended to affect the taxability of property. The same is true of the dormant minerals act. The dormant minerals act has similar objectives to the other acts and leads to substantially the same result.¹²⁶ But, the dormant minerals act does not affect the taxability of severed oil and gas rights.

Because the dormant minerals act does not exempt severed oil and gas rights from foreclosure for delinquent taxes, lower courts erred in holding that the foreclosure of severed oil and gas rights for delinquent taxes was inconsistent with the dormant minerals act.

V. The requirements of the GPTA as amended by Act 123 afford owners of severed mineral interests due process protection consistent with the State and Federal Constitutions.

A. Standard of Review

Because this issue was decided below on summary disposition and since the issue presented involves statutory construction, review is de novo.¹²⁷ Declaratory rulings are also reviewed de novo.¹²⁸

B. Analysis

Because the Court of Appeals incorrectly determined that severed oil and gas interests were exempt from taxation and foreclosure under the GPTA, it never addressed the Circuit Court's ruling regarding the constitutionality of the notice provisions of Act 123. However, this is a purely legal question that is appropriate for review along with the other issues.

¹²⁶ *Van Slooten v Larsen*, 410 Mich at 51, n 24.

¹²⁷ *Bingham Twp v RLTD R Co*, 463 Mich 634; 624 NW2d 725 (2001); *Kellogg Co v Dep't of Treasury*, 204 Mich App 489, 492; 516 NW2d 108 (1994).

¹²⁸ *AFSCME v Detroit*, 468 Mich 388, 398; 662 NW2d 695 (2003).

Persons with interests in lands are entitled to certain due process protection in the tax reversion process. *Dow v Michigan* addressed the tax foreclosure process that existed prior to the adoption of § 131e of the GPTA and defined the necessary due process protection:¹²⁹

[I]t would satisfy constitutional requirements if the state were to adopt a procedure providing for (i) ordinary mail notice before sale to the person to whom tax bills have been sent and to "occupant," and (ii) after sale to the state, formal notice to all owners of significant property interests of the constitutionally required opportunity for hearing and redemption. The burden required by the Constitution is manageable.

The Court held that "an elementary and fundamental requirement of due process in the proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."¹³⁰ Under the new foreclosure process, the judicial foreclosure hearing is the "proceeding which is to be accorded finality" and interested parties are, therefore, entitled to appropriate notice of the judicial hearing. *Dow* held that notice by mail is adequate if "directed at an address *reasonably calculated to reach the person entitled to notice*" and added that:¹³¹

such would be the efforts one desirous of actually informing another might reasonably employ. If the State exerts reasonable efforts, then failure to effectuate actual notice would not preclude foreclosure of the statutory lien and indefeasible vesting of title on expiration of the redemption period.

In *Smith v Cliffs on the Bay Condominium Ass'n* this Court upheld the constitutionality of the legislative amendments adopted in response to *Dow*:¹³²

Following our *Dow* decision, the Legislature enacted 1976 PA 292, adding additional notice provisions. See MCL 211.61b; MSA 7.106(1), MCL 211.73c;

¹²⁹ *Dow v Michigan*, 396 Mich at 212 (footnote omitted).

¹³⁰ *Dow v Michigan*, 396 Mich at 205-206.

¹³¹ *Dow v Michigan*, 396 Mich at 211 (footnote omitted, footnote omitted).

¹³² *Smith v Cliffs on the Bay Condominium Ass'n*, 463 Mich 420, 428-429; 617 NW2d 536 (2000), *cert den* 532 US 1020 (2001).

MSA 7.119(2), MCL 211.131c(1); MSA 7.190(1)(1); and MCL 211.131e(1); MSA 7.190(3)(1). With those changes, the General Property Tax Act now includes an extensive set of procedures for notice of the steps in the tax sale process. These procedures meet the requirements set forth in *Dow* and thus provide a constitutionally sound procedure for sale of property because of nonpayment of taxes.

The Court also held that courts cannot impose requirements beyond those set by the Legislature:¹³³

The Legislature has provided a notice procedure that meets constitutional standards. The Court of Appeals decision in this case constitutes an improper intrusion into the Legislature's authority to regulate tax sale proceedings. The courts lack the authority to create new notice requirements. The fact that another statutory scheme might appear to have been wiser or would produce fairer results is irrelevant. Arguments based on such policy considerations must be addressed to the Legislature. Similarly, the fact that the township might have sought out defendant's legal residence in a more thorough or conscientious manner is not relevant to our analysis, in light of the language of the statute.

Under Act 123, notice is required, by §§ 78i(1) and (2) [MCL 211.78i(1) and (2)] to be sent to "the address reasonably calculated to apprise . . . owners of a property interest" of the pendency of the administrative show cause hearing and the judicial foreclosure hearing. Section 78i(7) requires the notice to include:

- Date of the forfeiture to the county treasurer.
- A statement that the person notified may lose his or her interest in the property as a result of the foreclosure proceeding under § 78k.
- A legal description or parcel number of the property and the street address of the property, if possible.
- The person to whom the notice is addressed; the total taxes, interest, penalties, and fees due on the property.
- The date and time of the administrative show cause hearing and the judicial foreclosure hearing.
- A statement that unless the forfeited unpaid delinquent taxes, interest, penalties, and fees are paid by the March 31 after judgment is entered in the foreclosure proceeding under § 78k, the title to the property shall vest absolutely in the foreclosing governmental unit.

¹³³ *Smith v Cliffs on the Bay Condominium Ass'n*, 463 Mich at 430 (citations omitted).

- An explanation of the person's rights of redemption and notice that the rights of redemption will expire on the March 31 after judgment is entered in the foreclosure proceeding under § 78k.

These requirements meet the due process requirements set forth in *Dow* and *Cliffs on the Bay*.

Under Act 123, a Judgment of Foreclosure entered pursuant to § 78k extinguishes all interests, recorded and unrecorded, except "future installments of special assessments and liens recorded by this state or the foreclosing governmental unit pursuant to the natural resources and environmental protection act" and "a visible or recorded easement or right-of-way, private deed restrictions, or restrictions or other governmental interests imposed pursuant to the natural resources and environmental protection act." [MCL 211.78k(4)] Section 78k provides no exception from foreclosure for oil and gas interests or severed interests. Nor does any other language of Act 123 or the GPTA provide such exceptions. Where the Legislature has listed specific exceptions, the failure to except severed interests implies no such exception exists.¹³⁴ Thus, oil and gas interests and severed rights are not exempt from foreclosure.

Nonetheless, severed oil and gas interests are a property interest that cannot be extinguished without due process.¹³⁵ Thus, owners of severed oil and gas rights, like other owners of property interests in forfeited property, are entitled to notice under § 78i. [MCL 211.78i]

Under Act 123, FGUs must obtain a title search to identify "the owners of a property interest in the property" entitled to notice of the administrative show cause hearing and of the judicial foreclosure hearing. [MCL 211.78i(1)] "The owner of a property interest is entitled to notice" under Act 123 [MCL 211.78i(6)] if the owner's interest is of record in any of the following:

¹³⁴ *Hoste v Shanty Creek Mgmt, Inc*, 459 Mich 561, 572 n 8; 592 NW2d 360 (1999).

¹³⁵ *Van Slooten v Larsen*, 410 Mich at 53.

- Records in the office of the county register of deeds.
- Tax records in the office of the county treasurer.
- Records in the office of the local assessor.
- Records in the office of the local treasurer.

FGUs must send notice of the administrative show cause hearing and of the judicial foreclosure hearing by certified mail, return receipt requested, to "the owners of a property interest in the property" at "the address reasonably calculated to apprise those owners of a property interest" in tax-delinquent property, concerning the pendency of the administrative show cause hearing and the judicial foreclosure hearing. [MCL 211.78i(2)] Thus, Act 123 effectively requires a title search and notice to record interestholders.

The State recognizes that identifying the owners of severed oil and gas interests may not be simple, since the oil and gas interests beneath a given platted lot may have been severed by a metes and bounds description prior to platting of the subdivision. Nonetheless, assuming that owners of severed oil and gas rights are entitled to notice of the foreclosure hearing, even if identifying them is difficult, the GPTA requires notice be given.

The Trial Court appeared to suggest, without support, that all parties to a unitization agreement that includes a forfeited parcel are entitled to notice of the foreclosure.¹³⁶ This is incorrect. The other parties to a unitization agreement do not have a property interest that is subject to foreclosure. As set forth in the sample Unitization Agreement attached to the Complaint: "Nothing in this Agreement shall be construed to result in the transfer of title to any Oil and Gas Rights by any Interest Owner to any Interest Owner."¹³⁷ The new owner of the property after foreclosure, either an FGU or a purchaser from the FGU, steps into the shoes of the former owner and the other interests in the unitization agreement continue in place. Thus,

¹³⁶ Trial Court Decision, Appendix 29a-30a.

¹³⁷ Unitization Agreement, Exhibit 2 attached to Complaint, Appendix 81a.

while the FGU must give notice to the owners of severed oil and gas rights, notice is not necessary to all of the interestholders in a unitization agreement.

VI. A lessee of oil and gas rights under a recorded lease from the surface/mineral owner is entitled to notice in the foreclosure proceeding.

A. Standard of Review

Whether a lessee is entitled to notice in the tax foreclosure proceeding is a question of law that is reviewed de novo.¹³⁸

B. Analysis

In its October 27, 2005, Order granting leave, the Court directed the parties to brief whether a lessee of mineral rights who has leased the rights from the surface estate owner is (a) entitled to notice in foreclosure proceedings under the GPTA or (b) has a "severed" mineral interest that is unaffected by foreclosure proceedings involving the surface estate. Assuming the surface owner also owns the mineral rights and assuming the lease is recorded, the lessee is entitled to notice as the lessee holds a significant property interest that will be cancelled as a result of the tax foreclosure's cancellation of the lessor's interest in the oil and gas.

Oil and gas in place are an interest in real property. When severed from the soil they become personal property.¹³⁹ An oil and gas lease is also an interest in real property.¹⁴⁰ Unlike a mineral reservation or deed, a lease does not sever fee title to the oil and gas estate.

¹³⁸ *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 566-567; 702 NW2d 539 (2005).

¹³⁹ *Mark v Bradford*, 315 Mich 50, 58; 23 NW2d 201 (1946); *Jaenicke v Davidson*, 290 Mich 298, 303; 287 NW 472 (1939).

¹⁴⁰ *Jaenicke v Davidson*, 290 Mich 298, 303-304; 287 NW 472 (1939).

A foreclosure judgment under Act 123 extinguishes all recorded and unrecorded interests in the foreclosed property with certain exceptions not relevant to oil and gas leases¹⁴¹ unless, as discussed in Argument II.C., the interest is exempt from taxation. State Defendants are unaware of any published cases holding the leasehold interests are "significant property interests" entitled to notice of the foreclosure under *Dow*. However, *Detroit Building Authority v Michigan Financial Investments, LLC* and *Jackson County Treasurer v Christie* both suggest that holders of recorded leases are entitled to notice of a tax foreclosure under Act 123.¹⁴²

Because an oil and gas lease is an interest in real property, it is extinguished by the tax foreclosure, unless the lease is exempt from taxation. Arguably, an oil and gas lease is exempt from taxation by virtue of § 15 of the severance tax act, which clearly applies to leases. Even an exemption from taxation, however, does not protect the lease from cancellation, where the tax foreclosure cancels the lessor/surface owner/mineral owner's interest in the oil and gas. Foreclosure of a superior interest terminates a lease.¹⁴³ If the surface/mineral owner fails to pay real property taxes, the oil and gas interests are foreclosed along with the surface estate.¹⁴⁴ And all liens and encumbrances on the foreclosed property are cancelled by the tax foreclosure.

¹⁴¹ MCL 211.78k(5)(e). Visible or recorded easements or rights-of-way, private deed restrictions, and restrictions or other governmental interests imposed pursuant to the Natural Resources And Environmental Protection Act, 1994 PA 451, MCL 324.101 *et seq*, survive the foreclosure. *Id.*

¹⁴² *Detroit Building Authority v Michigan Financial Investments, LLC*, unpublished opinion per curiam of the Court of Appeals, decided 7/5/05 (No. 253479), 2005 Mich. App. LEXIS 1609, attached as addendum; *Jackson County Treasurer v Christie (In re Foreclosure of Certain Parcels)*, unpublished opinion per curiam of the Court of Appeals, decided 5/11/04 (No. 246672), 2004 Mich App LEXIS 1174, 472 Mich 903; 696 NW2d 49, attached as addendum.

¹⁴³ *Tilchin v Boucher*, 328 Mich 355; 43 NW2d 885 (1950); *Dolese v Bellows-Claude Neon Co*, 261 Mich 57; 245 NW 569 (1932).

¹⁴⁴ *Antrim County Treasurer v Dep't of Treasury*, 263 Mich App at 479-480, Appendix 49a-50a.

[MCL 211.78k(5)] Accordingly, a lease from the surface/mineral owner is extinguished by the tax foreclosure.

Because the lessee has a significant property interest that is extinguished by the tax foreclosure, the lessee is entitled to notice of the foreclosure procedure.¹⁴⁵

RELIEF

Appellants ask that this Court reverse the Trial Court and the Court of Appeals and declare that severed oil and gas rights are subject to taxation and foreclosure under the General Property Tax Act; that taxes paid under the severance tax act on oil and gas removed from the ground are not in lieu of ad valorem real property taxes on severed oil and gas rights; and that the notice provisions of 1999 PA 123 do not violate the due process rights of owners of severed oil and gas rights.

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¹⁴⁵ *Dow v Michigan*, 396 Mich 192.